DOCKET

No. 08-876

Title:	Conrad M. Black, John A. Boultbee, and Mark S. Kipnis, Petitioners
	v.
	United States
Docketed:	January 12, 2009
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(07-4080, 08-1072, 08-1106)
Decision Date:	June 25, 2008
Rehearing Denied:	August 13, 2008

Questions Presented

Date	Proceedings and Orders
Oct 28 2008	Application (08A374) to extend the time to file a petition for a writ of certiorari from November 11, 2008 to January 10, 2009, submitted to Justice Stevens.
Oct 29 2008	Application (08A374) granted by Justice Stevens extending the time to file until January 10, 2009.
Jan 9 2009	Petition for a writ of certiorari filed. (Response due February 11, 2009)
Feb 4 2009	Order extending time to file response to petition to and including March 13, 2009.
Mar 5 2009	Order further extending time to file response to petition to and including April 13, 2009.
Apr 13 2009	Brief of respondent United States in opposition filed.
Apr 27 2009	Reply of petitioners Conrad M. Black, et al. filed. (Distributed)
Apr 28 2009	DISTRIBUTED for Conference of May 14, 2009.
May 18 2009	Petition GRANTED.
May 28 2009	Application (08A1063) of petitioner Conrad M. Black for bail pending appeal, submitted to Justice Stevens.
May 29 2009	Supplemental appendix of applicant Conrad M. Black filed.
Jun 1 2009	Response to application (08A1063) requested by Justice Stevens, due June 5, 2009, by 4 p.m.
Jun 5 2009	Response to application from respondent United States filed.
Jun 9 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including July 30, 2009.
Jun 9 2009	The time within which to file respondent's brief on the merits is extended to and including September 28, 2009.
Jun 9 2009	Reply of applicant Conrad M. Black filed.
Jun 11 2009	Application (08A1063) denied by Justice Stevens. The application of Conrad M. Black for bail pending appeal is denied without prejudice to applicant's refiling his request in the District Court.
Jul 6 2009	The time within which to file respondent's brief on the merits is further extended to and including September 30, 2009.
Jul 30 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 30 2009	Joint appendix filed. (Statement of costs received.)
Jul 30 2009	Brief of petitioners Conrad M. Black, et al. filed.
Jul 31 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioners.

Aug 6 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Aug 6 2009	Brief amicus curiae of Jeffrey K. Skilling filed.
Aug 7 2009	Application (09A144) of petitioner Conrad M. Black for bail, submitted to Justice Stevens.
Aug 10 2009	Application (09A144) denied by Justice Stevens.
Sep 17 2009	Brief amicus curiae of Citizens for Responsibility and Ethics in Washington filed.
Sep 28 2009	SET FOR ARGUMENT ON Tuesday, December 8, 2009.
Sep 29 2009	CIRCULATED
Sep 30 2009	Brief of respondent United States filed. (Distributed)
Oct 9 2009	Record for the U.S.C.A. for the 7th Circuit electronic.
Oct 15 2009	Application (09A347) for an extension of time within which to file petitioners' reply brief on the merits, submitted to Justice Stevens.
Oct 15 2009	Application (09A347) granted by Justice Stevens for an extension of time within which to file petitioners' reply brief on the merits to and including November 2, 2009.
Nov 2 2009	Reply of petitioners Conrad M. Black, John Boultbee, and Markk S. Kipnis filed. (Distributed)
Nov 10 2009	Record received from U.S.D.C. for the Northern District of Illinois, 3 boxes
Dec 8 2009	Argued. For petitioners: Miguel A. Estrada, Washington, D.C. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

michael.r.dreeben@usdoj.gov

Party name: United States

Other:

Jonathan L. Marcus	Covington & Burling, LLP 1201 Pennsylvania Avenue, NW Washington, DC 20004	(202) 662-6000

Party name: National Association of Criminal Defense Lawyers, et al.

Daniel M. Petrocelli	O'Melveny & Myers LLP 1999 Avenue of the Stars, 7th Fl. Los Angeles, CA 90067	(310) 553-6800

Party name: Jeffrey K. Skilling

Lawrence S. Robbins	Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP 1801 K Street, N.W. Suite 411L Washington, DC 20006	(202) 775-4500

Party name: Chamber of Commerce of the United States of America

Anne L. Weismann	Citizens for Responsibility and Ethics in Washington 1400 Eye Street, NW Suite 450 Washington, DC 20005 aweismann@citizensforethics.org	(202)-408-5565

Party name: Citizens for Responsibility and Ethics in Washington

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

08-816 - 2009

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500
Counsel for Petitioner Black

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
Counsel for Petitioner Kipnis

QUESTIONS PRESENTED

This Court held in *McNally v. United States*, 483 U.S. 350 (1987), a public corruption case, that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to good government. Congress responded in 1988 by enacting 18 U.S.C. § 1346, which expands the definition of a "scheme or artifice to defraud" under the mail and wire fraud statutes to encompass schemes that "deprive another of the intangible right of honest services."

Twenty years later, the courts of appeals are hopelessly divided on the application of Section 1346 to purely private conduct. In this case, the Seventh Circuit disagreed with at least five other circuits and held that Section 1346 may be applied in a purely private setting irrespective of whether the defendant's conduct risked any foreseeable economic harm to the putative victim. In the alternative, the Seventh Circuit ruled that the defendants forfeited their objection to the improper instructions by opposing the government's bid to have the jury return a "special verdict," a procedure not contemplated by the criminal rules and universally disfavored by other circuits as prejudicial to a defendant's Sixth Amendment rights.

1. Whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed.

2. Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

PARTIES TO THE PROCEEDING

The three petitioners were defendants in the district court. Co-defendant Peter Y. Atkinson, who was also an appellant in the Seventh Circuit, is not seeking certiorari. F. David Radler and The Ravelston Corporation Limited—a privately held Canadian corporation—were defendants in the district court but entered into plea agreements with the government before trial. They were not parties in the Seventh Circuit and are not parties before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Conrad M. Black, John A. Boultbee, and Mark S. Kipnis respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-17a) is published at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered June 25, 2008. A petition for rehearing was denied August 13, 2008. On October 29, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari until January 10, 2009 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341 provides, in relevant part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud * * * places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any

such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both."

18 U.S.C. § 1346 provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

STATEMENT

In a sweeping and over-reaching 17-count indictment, the government accused petitioners of treating the public company of which they were officers as their personal piggy bank, siphoning off money to support undeserved, lavish lifestyles, principally through payments made under allegedly bogus non-competition agreements reached in transactions between the company and third parties. After a four-month trial, the jury acquitted petitioners on nearly all counts, soundly rejecting this principal theory of prosecution. Petitioners were convicted on three counts of mail fraud, based on an instruction that permitted the jury to find a "scheme to defraud"—a hotly contested element of the offense—by determining that petitioners *either* (1) stole the company's money, *or* (2) deprived the company or its shareholders of their "right" to petitioners' "honest services."

The first theory would have required jurors to find that petitioners were guilty of theft pure and simple. But the second theory permitted convictions even if the jurors believed that the money was rightly petitioners' and that they therefore inflicted no pecuniary or other economic injury on their employer—so long as the jurors believed that petitioners did not honor Delaware's business corporation law in structuring the payments and, as a result, obtained a lawful tax "benefit" in Canada. The Seventh

Circuit upheld the convictions, even though the government could not remotely meet its burden of proving harmlessness beyond a reasonable doubt given the virtual certainty that the jury relied on a seriously flawed instruction that would have been instructional error in at least five other circuits.

1. Petitioners were executives of Hollinger International, Inc. (Hollinger), a publicly held Delaware media company. Petitioner Conrad M. Black was Hollinger's Chairman and CEO. Petitioner John A. Boultbee was Hollinger's Executive Vice President, and, for a time, its Chief Financial Officer. Petitioner Mark S. Kipnis, a Chicago lawyer, was Hollinger's Corporate Counsel and Secretary.[1]

Hollinger's roots were in Black's and David Radler's acquisition in 1969 of a single Canadian newspaper, the Sherbrooke Daily Record.[2] Tr 7476-77. Under their successful management, Hollinger ultimately purchased hundreds of community newspapers, as well as several national and other large newspapers. These included the *Jerusalem Post* and *The Chicago Sun Times*, as well as, on Black's personal initiative, the purchase of the *Daily Telegraph* of London and the launching of the *National Post* in Canada. Tr 8125, 8131, 8142, 8159-76. Black's management, over nearly two decades, of the *Telegraph* alone resulted in profit to Hollinger and its shareholders of hundreds of millions of dollars. Tr

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[1] Peter Y. Atkinson, a co-defendant below but not a petitioner here, was Vice President of Hollinger.

[2] Radler, a co-defendant and President and Chief Operating Officer of Hollinger, agreed to testify for the government in exchange for leniency.

8159-64. Black built Hollinger's international newspaper empire from a mere $20,000 in equity to market capitalization exceeding $1 billion. Tr 8178.

Black and Radler managed the business through Ravelston Corp. Ltd. (Ravelston), a private Canadian company in which their combined ownership interest was nearly 80%. Ravelston, in turn, owned a controlling interest in Hollinger, Inc., a holding company that controlled Hollinger through a super-majority of voting shares.[3] In fact, Hollinger typically paid petitioners and Radler no salary or other monetary compensation directly; they were usually compensated by Ravelston, which in turn received substantial management fees from Hollinger on account of petitioners' services.

Beginning in the late 1990s, Hollinger's board of directors approved Black's prescient proposal to divest the company of most of its smaller newspapers based on his accurate prediction of the deleterious effects that the Internet would have on print media. Although Black's strategy proved to be a financial success for Hollinger and its shareholders, generating very large capital gains, it also was the genesis of federal criminal charges against petitioners. According to the government, petitioners had simultaneously engaged in a scheme to steal from Hollinger and its subsidiaries by causing those companies to pay petitioners and others for entering into purport-

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[3] In the district court, Hollinger International was often referred to as "International," and the holding company—Hollinger Inc.—was referred to as "Inc." This petition follows the shorthand used by the court of appeals, referring to Hollinger International as "Hollinger."

edly unnecessary and bogus covenants not to compete.[4]

Petitioners' defense to these charges was straightforward: the non-competition agreements were not bogus. Some had been expressly sought by the would-be purchasers of Hollinger's newspaper properties, who understandably were not keen to risk competition from the executive team that had successfully built Hollinger into an international media empire. As relevant here, one set of agreements—which restricted Black, Boultbee, and others from competing with Hollinger and its affiliates after they left Hollinger—was a straightforward mechanism to minimize the tax burden of the Canadian defendants. Under then-applicable Canadian law, payments received pursuant to non-competition agreements were not taxable. This was so regardless of whether the payments were in lieu of other income that the payees might have received, so long as the payees were in fact legally bound by an agreement not to compete. Here, the management fees that otherwise would have been paid by Hollinger to Ravelston, and in due course by Ravelston to various Canadian defendants, were re-characterized as non-compete payments to the individuals to take advantage of the Canadian tax ruling.

The indictment attempted to anticipate petitioners' defense by alleging that they had schemed to defraud not only Hollinger, but also the Canadian fisc. Before trial, however, the government abandoned

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[4] Kipnis was not party to, nor was he paid under, the covenants; he was instead accused of aiding and abetting his co-defendants.

any attempt to prove that petitioners' position on Canadian tax law was erroneous—much less that it was so unsupportable that it was a "fraud" on the Canadian fisc. To reflect its abandonment of that theory, the government filed a 17-count superseding information that restated the alleged fraud on Hollinger, but removed the allegations of fraud on Canada. Pet. App. 24a-121a.

Notably, the information, like the preceding indictment, did not stop at alleging a scheme to steal money from Hollinger. Lacking enough confidence in its "looting" allegations to rely on them alone, the government further alleged that petitioners' supposed scheme *also* "fraudulently deprived [Hollinger] International of its right to receive their honest services." *Id.* at 36a-37a. According to the government, petitioners breached "the fiduciary duty" that each owed to Hollinger under Delaware corporate law "because," in issuing checks and preparing and signing "fraudulent non-competition agreements," petitioners were "benefitting themselves to the detriment of [Hollinger]." *Id.* at 52a.

2. Petitioners interposed a vigorous defense at trial, including *uncontradicted* expert testimony that established that re-characterizing management fees as non-compete payments was entirely proper under Canadian law, so long as the non-competition agreements did, in fact, bind the payees not to compete (as was the case here). Pet. App. 142a-148a.

Significant parts of the government's own case bolstered petitioners' defense. For example, of the three fraud counts on which petitioners were ultimately convicted, the two that involved the most substantial transactions accused petitioners of improperly taking $5.5 million, under the guise of bo-

gus non-compete agreements, from American Publishing Company (APC)—a Hollinger subsidiary that had owned most of Hollinger's U.S. newspapers, but by the time of the agreement in question held a single small newspaper in California. Petitioners responded that the Hollinger board had approved the $5.5 million as payment by APC for services received under the management agreements with Ravelston. APC and dozens of other Hollinger subsidiaries routinely paid such management fees to Ravelston, on Hollinger's behalf and in proportionate shares, with the express approval of Hollinger's audit committee. Radler—the government's star witness, President of APC, and the man who devised the APC transaction—*agreed with petitioners on this point.*

Indeed, Radler testified unequivocally in the grand jury, on direct examination for the government as its main witness at trial, and again on cross examination, that he believed the $5.5 million *was* included within the overall annual management fee amount that the board had previously approved. Pet. App. 129a-33a, 139a. Radler also testified that he tied payment of the $5.5 million to non-compete agreements, signed by Black, Boultbee, Radler and Atkinson—agreements that prevented them from competing with publications owned by any affiliate of APC (including Hollinger itself) for three years after their departure from Hollinger. *Id.* at 123a, 127a; *id.* at 156a-163a (Noncompetition Agreement).[5] And he specifically acknowledged doing so in order that he

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[5] Hollinger at the time owned approximately 100 newspapers in the greater Chicago area alone. Tr 9356-57; DX JB Newspapers 1.

and the Canadian defendants, including Black and Boultbee, could take advantage of the Canadian ruling that exempted the proceeds of non-compete agreements like petitioners' from Canadian income tax. *Id.* at 127a, 133a. The government was reduced to arguing to the jury that its own star witness—and the man presumably in the best position to know—was simply wrong.[6]

3. From the outset of its summation, the government emphasized that its theories of fraud—fraud by theft and "honest services" fraud—were independent of each other. The prosecutor reminded the jurors that while "one of the theories behind this fraud" was that petitioners "stole money and property from the company," "[t]here's also a second theory" that "has to do with something called honest services." Pet. App. 171a (explaining honest services as an officer's "fiduciary duty of loyalty to the corpo-

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[6] The government vainly attempted to undermine its own proofs with evidence that the audit committee members did not remember approving a $5.5 million payment from APC, and that these payments were not handled in the same manner as other management fees. But the government—which abruptly changed course on appeal to argue that its own key witness had *perjured* himself (Govt. Appeal Brief at 36)—did not even attempt at trial to impeach Radler's testimony that the $5.5 million was part of a *larger* amount *previously* approved by the committee. Pet. App. 132a. Nor is it surprising that *these* payments were handled unlike *other* management fee payments; they needed to be characterized otherwise to satisfy the Canadian tax rules. Similarly, because the payments were owed and approved as management fees—and did not originate as compensation for the non-compete agreements—it was of no legal significance whether the board would have agreed to pay $5.5 million (or any other amount) for the APC non-compete covenants.

ration and its public shareholders," and "mention[ing] it * * * right at the outset" of summation "because it is a common thread that runs through what we're going to be talking about today"). The prosecutor added that "[s]tealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious; and, it's part of the fraud that is alleged in this case." *Id.* at 172a. In making its case for conviction under this second theory, the government elicited—and then emphasized in summation—testimony that petitioners purportedly violated state-law fiduciary duties arising from their positions as officers of a Delaware public company. *See, e.g., id.* at 150a-152a, 154a-155a, 165a-166a, 173a-182a.

Consistent with the language of the information and the case law in several circuits, petitioners sought an instruction that would have precluded the jury from convicting of "honest services" fraud unless it found that the alleged scheme contemplated gain to petitioners *at the expense of* the purported victims. In particular, in response to the government's proposed instruction that the statutes "can be violated whether or not there is any monetary loss or financial damage to the victim of the crime," petitioners argued for the following addition: "However, the scheme, if successful, must wrong the alleged victim's property rights in some way." Pet. App. 198a (proposed change to Government's Revised Instruction 32); *see also id.* at 187a (Defendants' Instruction No. 34-A: "In order to prove a scheme to defraud, the government must prove that it was reasonably foreseeable to the defendant that the scheme could result in some economic harm to the victim."); *id.* at 185a-186a; *id.* at 208a-209a.

The district court rejected these and related requests, explaining that a requirement that the scheme, if successful, must wrong the alleged victim's property rights is "not the law in this circuit." *Id.* at 220a. Thus, in instructing the jury on the elements of mail fraud, the court advised the jury that the "scheme to defraud" element could be proven *either* by a theft of money or property *or* by petitioners' failure to render "honest services" to Hollinger, and to convict on the latter theory the jury could ignore the allegations of theft and instead find that the petitioner "misused his position for private gain for himself and/or a co-schemer" and that he "knowingly and intentionally breached his duty of loyalty." *Id.* at 235a-236a.

As a result of the court's ruling, the jury was permitted to return guilty verdicts on the fraud counts even if it rejected the government's main theory—that petitioners stole money from Hollinger. On the APC counts, for example, the instructions permitted the jury to convict even if some jurors accepted the testimony of Radler, the *government's* principal witness, and therefore concluded that Hollinger suffered *no* pecuniary harm because the money was to be paid as approved management fees in any event, and if those jurors further agreed with the defense that the payees only "benefited" to the extent of paying lower Canadian taxes, a benefit that was *not* at Hollinger's expense. As the prosecution presented the case, these facts would not stand in the way of conviction if the jury believed that petitioners failed to obey duties of "loyalty" imposed under Delaware corporate law when they recharacterized the payments to obtain favorable tax treatment in Canada.

The prosecution proposed a "special verdict" form that would have required the jury to identify, in the event of conviction, the theory of fraud it had accepted. In light of petitioners' argument that special verdicts would be both prejudicial and incompatible with the lack of a unanimity requirement on the theory of fraud, however, the prosecution advised the court that it had no objection to a general verdict. Pet. App. 228a. The court, which had already declined petitioners' offer to use post-verdict interrogatories instead of special verdicts, responded to the government's concession: "General form. Okay." *Id.*

The jury acquitted petitioners on all but three of the twelve fraud counts it considered—necessarily rejecting the government's sweeping claims that petitioners had embarked on a massive scheme to loot Hollinger.[7]

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[7] The court granted Kipnis's post-verdict motion for judgment of acquittal on one of those counts. The jury also acquitted Black of racketeering and tax charges. It convicted him of the remaining submitted charge—a single count of concealing documents from an official proceeding—on evidence that he had his assistant move personal papers and effects from his office for safekeeping, during regular business hours, on the eve of his eviction by new management. Included in those materials were copies of documents that, while of potential interest to others, had already been reviewed extensively by the company's outside investigators. The key issue was whether Black merely proceeded as any tenant would at the end of his tenancy or, instead, acted "corruptly"—with the "improper purpose" of "subvert[ing] or undermin[ing] the fact-finding ability of an official proceeding." Pet. App. 242a-243a. A jury knowing that Black had not committed mail fraud would have been much more likely to conclude that he acted with a clean conscience rather than a corrupt intent. Moreover, there was a serious risk of prejudicial spillover from the mountains of highly inflammatory

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4. The court of appeals affirmed. Although petitioners challenged the legal adequacy of the "honest services" instruction, the court premised much of its analysis on the assumption that the jury was entitled to find, and therefore could be assumed to have found, guilt on the government's *alternative* theory—that petitioners wrongfully took Hollinger's money. Thus, the court repeatedly alluded to "facts" that the jury "was entitled to find" (Pet. App. 3a-5a), and it ultimately asserted that "[h]ad the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them." *Id.* at 10a.

The court acknowledged that the "honest services" charge "did not require that the jury find that the defendants had taken any money or property from Hollinger," Pet. App. 5a-6a, but it rejected petitioners' argument "that for the statute to be violated, the private gain must be at the expense of the persons (or other entities) to whom the defendants owed their honest services." *Id.* at 6a. The court emphasized that "[t]he defendants do not deny that they sought a private gain" in the form of lower Canadian taxes, and on that basis dismissed their position as a

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evidence introduced on the fraud counts. *See, e.g., United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994) (reversing false statements convictions due to risk of prejudicial spillover from evidence that the government introduced on another count for which its theory of guilt was legally flawed). Thus, while the questions presented do not directly address this count, reversal of the fraud convictions at issue in this petition—counts 1, 6 & 7—would require reversal of that verdict as well.

"no harm-no foul argument." *Id.* at 6a. The court went on at length to analogize the lawful tax "benefit" that the Canadian defendants had obtained to the receipt of bribes by judges and other public officials. *Id.* at 6a-8a. And although the court disclaimed any intention to impose on "every corporate employee" a duty "to advise his employer of his tax status," the court also speculated that Hollinger's audit committee might have renegotiated the management fees owed to Ravelston if only the committee knew the extent to which petitioners could reduce their Canadian tax burdens as a result of the recent Canadian tax ruling. This demonstrated, in the court's view, "how honest services fraud bleeds into money or property fraud." *Id.* at 8a-9a.

Finally, the court ruled that "[e]ven if our analysis of honest services fraud is wrong, the defendants cannot prevail." *Id.* at 9a. The court noted that "[a]n error in jury instructions is subject to the harmless error doctrine," and that a special verdict might have eliminated doubt as to the basis for the jury's verdict. Because petitioners had opposed a special verdict in this case, however, the court ruled that their objections to the "honest services" charge were "forfeited." *Id.* at 10a-11a. The court imposed this new forfeiture theory of harmless error without citation to authority, and without acknowledging the overwhelming body of law from other circuits that condemns or disfavors "special verdicts" in criminal cases.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a severe and broad division in the circuits on the question whether a mail fraud charge based on a private individual's alleged scheme to defraud a private entity of "honest services" can be sustained without a

finding that the defendant's alleged scheme reasonably contemplated identifiable economic harm to the party to whom honest services are owed. The Seventh Circuit's decision that petitioners' convictions could stand in the absence of any such findings—merely because they obtained a lawful tax benefit in another country—sharply conflicts with the decisions of at least five courts of appeals. It permits an unduly expansive reach of the mail fraud statute that is inconsistent with this Court's precedents, the text and history of Section 1346, or any conceivably appropriate conception of the federal-state balance.

Nowhere is the need for clarity and restraint in the application of Section 1346 greater than where, as here, the government is prosecuting private conduct that has no connection to the type of honest services fraud that prompted the 1988 expansion of the mail fraud statute in the first place—public corruption by government servants. Courts have widely recognized that use of Section 1346 to subject private individuals to federal criminal liability poses "special risks" not present in the public sector, *United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999); *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997), and many have cabined the reach of the statute in accordance with this recognition. *See, e.g., United States v. Vinyard*, 266 F.3d 320, 327 (4th Cir. 2001) (collecting cases).

Indeed, absent such limitations the honest services provision could be violated "by every breach of contract or every misstatement made in the course of dealing." *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997). In particular, at least five courts of appeals would preclude conviction on an

"honest services" theory unless the defendant contemplated, or reasonably should have foreseen, some substantial risk of economic harm to the party who was owed the "honest services." If left unreviewed, the Seventh Circuit's departure from this requirement portends an unprecedented federalization of wholly private conduct that is properly the concern of state, not federal, law.

The Seventh Circuit's purported "harmless error" analysis is also cert-worthy in its own right. This Court recently reaffirmed in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008), that "a conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." As *Pulido* makes clear, this type of "*Yates* error" (*see Yates v. United States*, 354 U.S. 298 (1957)) may be found "harmless" only if a court can declare confidently that the error had no effect on the verdict, which in cases of this type—where the jury has been improperly instructed on an element of the offense—requires that *the prosecution* affirmatively negate the possibility of prejudice beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 15 (1999).

Rather than apply this conventional analysis, the Seventh Circuit penalized *the defense* by imposing a new and perverse rule of forfeiture that permits the government to retain a tainted conviction precisely *because* the government cannot meet its burden. For good measure, the Seventh Circuit's new rule requires that criminal defendants pay a heavy price to avoid forfeiture of their rights: they must accept a special verdict form, a device that other circuits overwhelmingly view as "a disfavored procedure" that invades the defendant's basic right to a fair

trial. 26 MOORE'S FEDERAL PRACTICE: CRIMINAL § 631.03[1] (2008) (noting that "the use of special questions and verdicts in any criminal proceeding, state or federal, is suspect not only as a matter of sound judicial policy [but] raises due-process concerns as well"). And regardless of whether that procedure might appropriately be used by *trial* courts in *some* cases (such as where the defendant requests or consents to it), nothing in the federal rules—or in this Court's cases construing them—permits an *appellate* court retroactively to declare that opposition to such a procedure requires forfeiture of an otherwise valid objection. To the contrary, at least two circuits have soundly rejected that view.

I. The Circuits Are Deeply Divided On The Application Of The "Honest Services" Statute To Private Conduct

1. At the time *McNally* was decided, the decisional law on "intangible rights" or "honest services" fraud dealt overwhelmingly with public corruption by government servants—what *McNally* described as a deprivation of the "intangible right of the citizenry to good government." 483 U.S. at 356. Only a small smattering of courts believed the theory was relevant to cases involving purely private conduct. *See McNally*, 483 U.S. at 362-64 & nn. 3, 4 (Stevens, J., dissenting) (listing cases of employees who accepted kickbacks, sold confidential information, or defrauded the victim of a right to privacy). Indeed, the Sixth Circuit decision that this Court reviewed in *McNally*—*i.e.*, the decision that this Court reversed because it construed fraud too *broadly*—had held that "misconduct of a fiduciary in the administration of exclusively private matters in his capacity as a private individual * * * is not actionable as a viola-

tion of the mail fraud statute under an intangible rights theory." *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986).

This Court rejected the "intangible rights" theory because of its indeterminacy and inherent ambiguity, which could not be squared with constitutional requirements of notice or the rule of lenity. 483 U.S. 359-60 (citing *United States v. Bass*, 404 U.S. 336 (1971), and other rule of lenity authorities); *cf. Kolender v. Lawson*, 461 U.S, 352, 357-60 (1983). "[T]here are no constructive offenses" under federal law, this Court explained. The Court therefore declined to "construe the statute in a manner that leaves its outer boundaries ambiguous * * * . If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360.

Congress's response—Section 1346—scarcely can be said to cure the obvious problems of vagueness and indeterminacy that underlay *McNally*; it is a single sentence that enjoins against "depriving another" of the "intangible right of honest services." As the en banc Second Circuit observed, one would have to "labor long and with difficulty in seeking a clear and properly limited meaning of 'scheme or artifice to deprive another of the intangible right of honest services' simply by consulting a dictionary for the literal, 'plain' meaning of the phrase." *Rybicki*, 354 F.3d at 135. The only thing that is clear is that the phrase has no established commonly understood or recognized meaning.

Courts attempting to construe Section 1346 have therefore fallen back on its sparse legislative history, which described the statute as "intended merely to overturn the *McNally* decision." 134 Cong. Rec. H11,251 (daily ed. Oct. 21, 1988) (Rep. Conyers).

Under this view, Section 1346 simply "restored the mail fraud statute to its pre-*McNally* scope, *according to previous opinions interpreting the intangible right to honest services.*" *Frost*, 125 F.3d at 364 (emphasis added); 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) (post-enactment Senate Report to the same effect).

This judicial search for "a clear and properly limited meaning" has proven a two-decade-long Sisyphean task. As the en banc Fifth Circuit has noted, "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion," because the doctrine never was a "unified set of rules," even in public corruption cases. *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (en banc). But this task is especially difficult and indeterminate in private cases. As Judge Jacobs, joined by three colleagues of the Second Circuit, observed, "even assuming that a term of art can be distilled from the body of case law that was overruled in *McNally*, surely no unambiguous meaning can be assigned to a phrase that has no meaning except what can be distilled from *some* pre-*McNally* cases provided that other pre-*McNally* cases are ignored[.]" *Rybicki*, 354 F.3d at 160 (en banc) (Jacobs, J, joined by Walker, Cabranes, and Parker, JJ, dissenting). This is "particularly" so, "since the designation of overruled cases that are in and those that are out is itself essentially arbitrary. Ordinary people cannot be expected to undertake such an analysis; rare is the lawyer who could do it; and no two lawyers could be expected to agree independently on the elements of an offense that must be defined by such a project." *Id.*

If this endeavor has not actually created a scheme of federal common law crimes in violation of longstanding authority, *United States v. Hudson*, 11 U.S. 32 (1812), it certainly has come perilously close to doing so. But even if one accepts the legitimacy of the exercise, no court has gone as far as the Seventh Circuit did in this case. Other circuits at least recognize that the private sector cases differ in nature from public corruption, since private individuals, unlike public servants, ordinarily work for money, not out of a pristine desire to advance the public weal. *See, e.g.*, *United States v. DeVegter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999); *Frost*, 125 F.3d at 365; *Jain*, 93 F.3d at 441-42. For this reason, courts attempting to construe Section 1346 in private sector cases at least limit themselves to "pre-*McNally* decisions involving or purportedly involving 'honest services' fraud in the private sector." *Rybicki*, 354 F.3d at 138-39. According to the decision below, however, in the Seventh Circuit a private individual who receives a *lawful* tax benefit but fails to disclose it to his employer may safely be compared with a state judge who takes bribes. Pet App. 6a-8a.

2. Apart from authorizing federal courts to fashion—at the government's urging—private sector "crimes" that no reasonable person could anticipate, the decision below further entrenches a deep and persistent circuit split that calls out for this Court's intervention. Nearly half of the federal courts of appeals that have addressed Section 1346 in the private sector context have concluded that the statute requires proof that the defendant intended, or at least reasonably could have foreseen that the scheme would cause, economic or property harm to the victim. The result is an intractable circuit split, with at least five courts of appeals (the Fourth, Sixth,

Eighth, Eleventh, and District of Columbia Circuits) requiring some showing of economic or pecuniary harm,[8] and three circuits, the Fifth, Seventh, and Tenth Circuits, holding that no showing of economic harm is necessary.[9]

The majority view requires the government to prove (at least) that economic harm was reasonably foreseeable. *Vinyard*, 266 F.3d at 327-28; *Frost*, 125 F.3d at 367-69; *DeVegter*, 198 F.3d at 1328-30; *Sun-Diamond Growers*, 138 F.3d at 973-74. Under this test, "[t]he crucial determination must be whether

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[8] *Vinyard*, 266 F.3d at 320 (4th Cir.); *Frost*, 125 F.3d at 368 (6th Cir.); *United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999); *DeVegter*, 198 F.3d at 1329 (11th Cir.); *Sun-Diamond Growers*, 138 F.3d 973 (D.C. Cir.). The First Circuit appears to take a similar position. *See United States v. Martin*, 228 F.3d 1, 17-18 & n.22 (1st Cir. 2000) (noting the requirement that a defendant know or contemplate that his conduct "'poses an independent business risk'" or creates "'reasonably foreseeable economic harm'" to his employer, and affirming conviction because the government's evidence established that this test was satisfied) (quoting *Sun-Diamond*, 138 F.3d at 973); *United States v. Serafino*, 281 F.3d 327, 332 (1st Cir. 2002) (affirming conviction because the government's proof "plainly sufficed to establish the requisite cognizable financial harm to MBC under section 1346") (citing *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996)). The Second Circuit appears to apply a similar rule in "self-dealing" cases of the type that the prosecution charged here, *see Rybicki*, 354 F.3d at 141 (en banc) ("In the self-dealing context, * * * the defendant's behavior must thus cause, or at least be capable of causing, some detriment – perhaps some economic or pecuniary detriment – to the employer."), but it otherwise generally relies on a "materiality" test, *id.* at 146.

[9] *United States v. Black*, 530 F.3d 596 (7th Cir. 2008); *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006); *United States v. Welch*, 327 F.3d 1081 (10th Cir. 2003).

the jury could infer that the defendant might reasonably have contemplated some concrete business harm *to his employer* * * * ." *United States v. Lemire*, 720 F.2d 1327, 1337 (D.C. Cir. 1983) (emphasis added); *Sun-Diamond Growers*, 138 F.3d at 973-74 (reaffirming *Lemire*); *see also Pennington*, 168 F.3d at 1065 (defendant must "cause or intend to cause actual harm or injury, and in most business contexts, that means financial or economic harm").

In other words, the majority rule "construe[s] the intangible right to honest services in the private sector as ultimately dependent upon the property rights of the victim." *Frost*, 125 F.3d at 369; *Vinyard*, 266 F.3d at 328 (adopting *Frost*); *DeVegter*, 198 F.3d at 1328-29 (adopting "well-reasoned standards" of *Frost* and *Lemire*). "Absent reasonably foreseeable economic harm, '[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the [employee] is insufficient to convict.'" *Sun-Diamond Growers*, 138 F.3d at 973 (quoting *Frost*, 125 F.3d at 368); *see also Jain*, 93 F.3d at 442 ("When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible 'rights' have been violated.").

By contrast, the courts that have rejected the majority rule have not successfully advanced any limiting principle that squares the statute with pre-*McNally* precedent or that saves it from almost certain unconstitutionality. The Fifth Circuit, for example, agrees that Section 1346 does not apply absent "some detriment" to the private employer, but also holds that "breach of the duty to disclose material information is a sufficient detriment to the employer"—a formulation that would seem to convert nearly any breach of state corporate governance law

or internal company rules into a federal crime. *See Brown*, 459 F.3d at 519. The Tenth Circuit evidently believes that any restriction on the outermost conceivable sweep of the statutory language constitutes "judicial legislation." *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003).

The Seventh Circuit has explained that its "limiting principle" is the requirement that the defendant's conduct result in "personal gain." *United States v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003). As this case demonstrates, however, the government need not prove that this "gain" comes *at the expense* of the party to whom honest services are owed, and thus it is difficult to find a link between the supposed "dishonesty" and any conceivable injury to the "victim." The only obstacle to converting every violation of corporate governance or company rules into federal crimes would seem to be the moment-to-moment whims of federal prosecutors.

Application of the majority rule in this case would clearly lead to a reversal. If the jury concluded—as it quite likely did given Radler's exculpatory testimony—that petitioners lawfully received the $5.5 million, but violated duties imposed under Delaware business law by failing to advise the board that the payments had been recharacterized for tax reasons, there is no reason to believe the jury would have found that this behavior caused, or even risked causing, detriment to Hollinger. The instructions thus permitted conviction in the absence of any finding—or indeed, of any evidence—that petitioners' conduct deprived Hollinger of "honest services" within the meaning of Section 1346.

3. As is evident from the sheer number and scope of the reported decisions, the dispute over the mean-

ing of the honest services provision in the private sector is supported by decisions from most circuits. The split has ripened over the 20 years since the statute was enacted, and the time has come for this Court to guide the lower courts for the first time on the proper scope of the provision. This case offers a particularly good vehicle for such guidance, given the clear risk that petitioners were in fact convicted on the basis of jury findings that would have been insufficient to convict in at least five circuits.

II. The Seventh Circuit Improperly Avoided The Prejudicial Error Analysis Required Under *Yates v. United States* Through Its Retroactive Ad Hoc Amendment Of The Rules Governing Objections To Instructional Error

1. Earlier this Term, the Court reaffirmed that when a count is submitted to a jury on two alternative theories, one of which is flawed as a matter of law, a resulting conviction must be reversed unless the reviewing court can determine that the erroneous instruction was harmless. *See Yates*, 354 U.S. at 312; *Pulido*, 129 S. Ct. at 534-35. Under the test for constitutional violations, *see Neder*, 527 U.S. at 15 (applying the harmless constitutional error test where the jury was permitted to convict without a proper finding on each element), "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

The government insisted *on appeal* that the jury convicted petitioners of mail fraud on counts 1, 6 and 7 because it concluded that they schemed to steal Hollinger's *money*. But *at trial* the prosecutors were unwilling to rest their case on "money" fraud alone,

and instead insisted on presenting an "independent" theory on which the jury could convict petitioners *even if* it concluded they stole nothing. These avowedly "independent" honest services allegations, based on disclosure duties supposedly imposed by Delaware corporate law, permitted the jury to convict petitioners of something that is not a crime. They were insurance for the prosecutors in the event the jury did not believe the government's case for theft—as indeed turned out to be the case. The court of appeals, however, spared the government the trouble of establishing that the error was harmless beyond a reasonable doubt. Instead, the court held that *petitioners*, who followed to the letter the written rules of criminal procedure—by making timely and contemporaneous objections to the jury charge—forfeited their right to reversal. The court improperly ruled that petitioners should have paid a substantial price for the government's insurance policy—waiver of their right to the important protections of a general verdict—if they wanted the court to engage in the prejudice analysis required by *Yates* and reaffirmed in *Pulido*.[10]

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[10] The problem with the jury charge here is that, unlike in several other circuits, the jury was *not required* to acquit under the second theory, even if it disbelieved the theft theory. To the contrary, the instructions relieved the government of the burden of proving that petitioners' gain was at the expense of Hollinger, and the government argued that honest services fraud and fraud by theft were *independent* theories. *E.g.* Pet. App. 183a. The Seventh Circuit therefore erred in suggesting that a harmless error analysis would not have changed the outcome. Pet. App. 10a (speculating that the jury would have acquitted had it believed the payments were owed to the defendants as management fees). At a minimum, therefore, the case should

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2. The federal *civil* rules provide for special verdicts in appropriate circumstances. *See* Rule 49. But, for good reason, the *criminal* rules do not. "In such trials the practice has been settled time out of mind to charge but one crime in one count, to accept but one general plea to it and to call upon the jury to make but one general response, guilty or not guilty." *Gray v. United States*, 174 F.2d 919, 923 (8th Cir. 1949). That is because the right to a general verdict in a criminal case is "one of the most essential features of the right of trial by jury * * * and the removal of this safeguard would violate its design and destroy its spirit." *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969) (internal quotation marks omitted). A number of other courts similarly have cautioned against the use of special verdicts in criminal cases because they risk infringement on the right to trial by jury. *See, e.g., United States v. McCracken*, 488 F.2d 406, 418 (5th Cir. 1974) (use of special verdicts in criminal cases converts "the sacred right to trial by jury [into] a mere empty formalism"; collecting cases) (superseded by statute on other grounds); *United States v. Blackwell*, 459 F.3d 739, 766 (6th Cir. 2006); *see also Mathews v. United States*, 485 U.S. 58, 73 n.3 (1988) (White, J., dissenting) ("as a general rule special verdicts are disfavored in criminal cases") (internal quotation marks omitted).

Special verdicts undermine the jury system in at least four ways. First, by outlining a "step by step

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be returned to the Seventh Circuit for a proper harmless error analysis in light of *Pulido*.

* * * progression of questions[,] each of which seems to require an answer unfavorable to the defendant," special verdicts can pressure "a reluctant juror" to vote for a conviction. *Spock*, 416 F.2d at 182; *see McCracken*, 488 F.2d at 419 (special verdicts provide a "step by step approach to a guilty verdict, [thus] formal[ly] catechizing * * * a juror wishing to acquit"). Second, special verdicts "infringe on [the jury's] * * * power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations." *McCracken*, 488 F.2d at 418; *Spock*, 416 F.2d at 181. Third, special verdicts "partly restrict [the jury's] historic function * * * of tempering rules of law by common sense brought to bear upon the facts of a specific case." *McCracken*, 488 F.2d at 418; *Spock*, 416 F.2d at 181. Fourth, special verdicts run the risk of confusing juries. *E.g.*, *Blackwell*, 459 F.3d at 766.

Although several circuits no longer adhere to the view that special verdicts *always* "are improper and in and of themselves erroneous," *United States v. Adcock*, 447 F.2d 1337, 1339 (2d Cir. 1971), it remains the case that they are "generally disfavored," *United States v. Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987), *United States v. Ellis*, 168 F.3d 558, 562 (1st Cir. 1999) (same), unless *the defendant* requests one. *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) (noting that the "prohibition is for the benefit of the defendant"). As a result, their use has been carefully reserved for special circumstances, such as where further inquiry of the jury is needed to establish the maximum punishment allowed. *See, e.g.*, *United States v. FanFan*, 468 F.3d 7, 13 (1st Cir. 2006) (special interrogatory that was used to determine whether the drug amount authorized imposi-

tion of a higher prison term did not pose the risks associated with special verdicts).

Even circuits that occasionally *allow* the use of special verdicts in some circumstances, though, have "reject[ed] the prosecution's effort to salvage an invalid conviction by faulting the defendant for failing to request interrogatories." *United States v. Ruggiero*, 726 F.2d 913, 926 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part) (describing the decision in *Adcock*, *supra*). The Second Circuit rejected such a forfeiture rule in *Adcock*, *supra*, and has reaffirmed that aspect of *Adcock*. *See, e.g.*, *Pforzheimer*, 826 F.2d at 206 (same). That outcome also follows from this Court's line of cases holding that criminal defendants may not be compelled to cede one right in order to enforce another. *See, e.g.*, *Simmons v. United States*, 390 U.S. 377, 391-92 (1968) (a defendant may not be forced into the "dilemma" of either forfeiting the opportunity to raise a Fourth Amendment claim or "assuming the risk that the testimony" from the suppression hearing "would later be admitted against him at trial").

The Seventh Circuit's new forfeiture doctrine also creates a direct conflict with a second court of appeals. In *United States v. Riccobene*, 709 F.2d 214, 228 (3d Cir. 1983), the Third Circuit rejected the government's argument that the defense "invited error" by refusing the government's request for special interrogatories that would identify the RICO predicates on which the jury agreed. "[W]e will not impose upon the defendants the harsh penalty of waiver merely for requesting that the district court exercise its discretion in a manner contrary to the

government's preferences." *Id.*[11] That conflict alone is reason enough for the Court to grant review.

3. Even if the ruling below did not force criminal defendants to pay a heavy price for failing to submit to the use of a verdict form that seriously impairs their Sixth Amendment right to trial by jury, the Seventh Circuit's decision still would warrant review and reversal. The court created out of whole cloth an extra-textual requirement for preserving instructional error and then imposed the consequences of it on petitioners without proper notice. Federal Rule of Criminal Procedure 30(d) "clarifies what, *if anything*, counsel must do to preserve a claim of error regarding an instruction or failure to instruct." *Id.* (advisory committee notes) (emphasis added). Those requirements are simply stated: the objecting party must "inform the court of the specific objection and the ground for the objection before the jury retires to deliberate." Rule 30(d). "Failure to object in accordance with this rule precludes appellate review except" under the rule governing "plain error." *Id.* That rule is the beginning and the end of the re-

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[11] The rule that the government successfully pressed below also directly contradicts the position it took in the Third Circuit. In *Riccobene*, the government argued that the defendants would have *preserved* their appellate rights had they agreed to *the government's* suggestion to use *post*-verdict interrogatories. *Id.* Petitioners here *did* agree to the use of post-verdict interrogatories, but the district court declined to use them. Pet. App. 224a-225a. The rule that the government now urges—and that the Seventh Circuit has now adopted—is the opposite of the rule that the government previously proposed. Under this newly minted rule, a defendant *forfeits* his appellate rights *even though* he consents to post-verdict interrogatories. No other court has even hinted at such a draconian rule.

quirements for appellate review of instructional error. No court is free to add that "failure to agree to a special verdict"—or that failure to agree to the next creative suggestion served up by a prosecutor "in an abundance of caution," Pet. App. 228a, *also* "precludes appellate review." And certainly not in the absence of notice that such a rule will be adopted and enforced.

This Court has clearly stated that when a rule conditions outcomes on the satisfaction of certain requirements, courts may not change those requirements. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (invoking the rule of "*[e]xpressio unius est exclusio alterius*," to hold that because Fed. R. Civ. P. 9(b) "impose[s] a particularity requirement in two specific instances," courts may not impose other particularity requirements). Federal courts lack "the power to develop rules that circumvent or are inconsistent with the Federal Rules of Criminal Procedure"—even when the conflict is only implicit, and regardless of whether the new "rules" would restrict or expand a party's rights. *Carlisle v. United States*, 517 U.S. 416, 420-21, 426 (1996); *Libretti v. United States*, 516 U.S. 29, 50 (1995) (under former criminal Rule 31(e)—which, until rescinded, was the *only* authority for special verdicts in criminal cases—there was no need to notify defendants of the right to a special verdict in forfeiture cases because, *inter alia*, such notification "is not among the * * * safeguards" specifically listed in the Rule).

New procedural requirements are imposed by rule—not on an ad hoc, case-by-case basis—so that a clear, knowable, and consistently applied set of obligations will govern and guide the conduct of litigants

and the courts. Rule 30(d), an integral part of that scheme, puts litigants on notice of the requirements for preserving claims of instructional error. Courts "are not at liberty to ignore the mandate of [the federal rules] in order to obtain 'optimal' policy results." *Carlisle*, 517 U.S. at 430; *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988) (judges do not have "discretion to disregard" the rules' text).[12]

Ad hoc amendments of federal procedural rules—rules carefully crafted through a process of notice, comment and review—are especially problematic when the penalty for non-compliance is imposed without proper notice that the rules have changed. Petitioners received no notice—none at all—that the rules would force them to serve several years in prison for engaging in non-criminal conduct simply because they declined a *suggestion* from the *government* that a disfavored and prejudicial type of verdict form be used. Even requirements *consistent* with federal procedural rules can only be imposed with notice and an opportunity to comment. *See, e.g.*, Fed. R. Crim. P. 57(a)(1) (governing district court local rules); Fed. R. App. P. 47(a)(1) (governing appellate court local rules). The Seventh Circuit plainly vio-

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[12] The government also argued in the court of appeals that petitioners forfeited their challenge to the honest services instruction by not complying with Rule 30(d). But, as noted above, petitioners objected to the government's proposed instruction; submitted their own written instructions to correct the error; and reiterated those objections and requests in open court after the jury was instructed. *See also* Pet. App. 248a. Not surprisingly, the court of appeals gave no credence to the government's conventional, but baseless, forfeiture argument; the court did not even mention it.

lated Rule 57(b)'s command that "no sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance." *See also* Fed. R. Crim. P. 47(b); *Thomas v. Arn*, 474 U.S. 140 (1985).

Finally, this case is the least defensible context for the Seventh Circuit's rule because it makes no sense. According to the Seventh Circuit, a special verdict would have rendered the *Yates* challenge "moot" if the jury "had indicated on the verdict that the defendants were not guilty of an honest services fraud." Pet. App. 10a-11a. But, as petitioners pointed out in arguing for a general verdict—and as the district judge recognized in her instructions to the jury—the law did not *require* the jury's unanimity on *that* question. In fact the judge had already *rejected* one defendant's argument for a requirement of juror unanimity on the particular theory that underlay each mail fraud count, explaining that the jury only needed to be "unanimous that the defendant engaged in a scheme to defraud." *Id.* at 217a (citing *United States v. Lyons*, 472 F.3d 1055, 1069 (9th Cir. 2007)). Because the jury could convict with *some* jurors finding a scheme to obtain money, *other* jurors finding a scheme to deprive of honest services, and the *remainder* finding *both*, the government's proposed special verdict would have been unworkable, unenlightening, an invasion of the jurors' thought processes during their deliberations, and a source of unnecessary confusion. No defendant can fairly be penalized for failing to succumb to such an outcome.

Despite the "formidable array of objections" to special verdicts (*Spock*, 416 F.2d at 180), and the lack of authority within the federal rules (or elsewhere) for a court to amend the prerequisites for preserving claims of instructional error, the Seventh Circuit penalized petitioners—without fair notice—because they were unwilling to assume one risk of improper conviction as the price for avoiding another. The court of appeals' novel re-writing of Rule 30(d), rejected by two other circuits, warrants this Court's review.

III. The Petition Raises Issues That Are Recurring And Important

As the extensive body of appellate decisional law alone attests, mail and wire fraud cases invoking Section 1346 have not only been routine, but they also continue to spark significant disagreement on core issues of federal criminal law: the balance between matters of state and federal concern; the rule against a common law of federal crimes; and the threat to due process posed by broadly and vaguely worded criminal statutes. With the government's recent, renewed emphasis on white collar crime prosecutions, there is every reason to expect that the need for clarity on this significant aspect of federal criminal law will only increase.

Even before *McNally*, no consensus had emerged in the lower courts over how—or even whether—to apply to purely private conduct a prohibition on schemes that deprive others of "the right to honest services." The enactment of Section 1346 has failed to lessen the need for this Court's review. Just the opposite. The discordant results of Congress's failure to heed the instruction to "speak more clearly," *McNally*, 483 U.S. at 360, are evident for all to see.

Twenty years later the split in the lower courts over the scope of this vaguely worded criminal prohibition has only deepened and become more entrenched, especially with respect to the prosecution of conduct in the private sphere. Nearly every circuit has now had the chance to decide whether the government must allege and prove any foreseeable economic or property harm to the putative victim. The resulting split in approaches could not be more deep-rooted. As a result, it is the district of prosecution—rather than the text of the statute—that now dictates whether persons can be deprived of their liberty. The time has come for this Court to clarify the meaning of Section 1346.

The second issue, itself the subject of a circuit conflict, is also of surpassing importance. Although the Seventh Circuit's novel waiver rule applies to any count where the jury is given a choice of two or more theories on which to convict (such as a multi-object conspiracy), the application of its rule in the Section 1346 context is itself worthy of review. The Seventh Circuit's de facto amendment of Rule 30(d) not only is erroneous, but it would also allow the government to evade review of the merits in criminal appeals on the basis of its tortured position. This case squarely presents the conflict between the Seventh Circuit, on the one hand, and the Second and Third Circuits, on the other. Review is warranted to shield defendants in other circuits from the risk of being forced to accept one unacceptable risk of improper conviction in order to preserve their right to challenge another.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500
Counsel for Petitioner Black

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
Counsel for Petitioner Kipnis

January 9, 2009

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 07-4080, 08-1030, 08-1072, 08-1106

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 05 CR 727—Amy J. St. Eve, *Judge*.

ARGUED JUNE 5, 2008—DECIDED JUNE 25, 2008

Before POSNER, KANNE, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. At the end of a four-month trial, the jury convicted the defendants of mail and wire fraud in violation of 18 U.S.C. § 1341

and Black in addition of obstruction of justice in violation of 18 U.S.C. § 1512(c). The judge sentenced him to 78 months in prison, Atkinson and Boultbee to 24 and 27 months, and Kipnis to probation with six months of home detention.

The defendants were senior executives (Black was the CEO) of an American company called Hollinger International, which through subsidiaries owns a number of newspapers here and abroad. It was controlled by a Canadian company, since defunct, called Ravelston, which in turn was controlled by Black, who owned 65 percent of its shares. (In between Hollinger and Ravelston was a holding company that we can ignore.) Black effectively controlled Hollinger through his majority stake in Ravelston. He owned some stock in Hollinger, but a much higher percentage of the stock of Ravelston, in which Atkinson and Boultbee also owned stock. So it was in his and their financial interest to funnel income received by Hollinger to Ravelston. This was done by Hollinger's paying large management fees to Ravelston.

Hollinger had a subsidiary called APC, which owned a number of newspapers that it was in the process of selling. When it had only one left—a weekly community newspaper in Mammoth Lake, California (population 7,093 in 2000, the year before the fraud)—defendant Kipnis, Hollinger's general counsel, prepared and signed on behalf of APC an agreement to pay the other defendants, plus David Radler, another Hollinger executive and a major shareholder in Ravelston, a total of $5.5 million in exchange for their promising not to compete with APC for three years after they stopped working for Hollinger. The money was paid. Neither Hollinger's

audit committee, which was required to approve transactions between Hollinger's executives and the company or its subsidiaries because of conflict-of-interest concerns, nor Hollinger's board of directors, was informed of this transaction. Or so the jury was entitled to find; the evidence was conflicting.

That Black and the others would start a newspaper in Mammoth Lake to compete with APC's tiny newspaper there was ridiculous. But the defendants argue that really the $5.5 million represented management fees owed Ravelston and that they had characterized the fees as compensation for granting covenants not to compete in the hope that Canada might not treat the fees as taxable income. Although Hollinger is a large, sophisticated, public corporation, no document was found to indicate that the $5.5 million in payments was ever approved by the corporation or credited to the management-fees account on its books. The checks were drawn on APC, though the evidence was that the defendants had no right to management fees from that entity, and were backdated to the year in which APC had sold most of its newspapers. The purpose of the backdating was—or so the jury could find—to make the compensation for the covenants not to compete seem less preposterous. And while management fees were supposed to be paid to *Ravelston* as well as from a management-fee account, the payments were made to the defendants personally and came from the proceeds of a newspaper sale, facts that increase the implausibility of supposing that these direct payments to the defendants were a means of discharging a debt owed them by Hollinger. It is true that Radler, who pleaded guilty and testified for the government, said that he thought the audit committee had approved

the so-called management fees. But the members of the committee testified otherwise and the jury was entitled to believe them.

There is more. The defendants failed to disclose the $5.5 million in payments in the 10-K reports that they were required to file annually with the Securities and Exchange Commission. And they caused Hollinger to represent to its shareholders falsely that the payments had been made "to satisfy a closing condition."

There was still more evidence of the fraud, but there is no need to go into it. The jury convicted the defendants of a second, similar fraud, on equally compelling evidence; there is no need to extend the opinion with a discussion of that either.

The evidence established a conventional fraud, that is, a theft of money or other property from Hollinger by misrepresentations and misleading omissions amounting to fraud, in violation of 18 U.S.C. § 1341. *United States v. Orsburn*, 525 F.3d 543, 545-46 (7th Cir. 2008). But the jury was also instructed that it could convict the defendants upon proof that they had schemed to deprive Hollinger and its shareholders "of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger," provided the objective of the scheme was "private gain." That instruction is the focus of the appeals.

Section 1346 of the federal criminal code, added in 1988 in order to overrule *McNally v. United States*, 483 U.S. 350 (1987), defines "scheme or artifice to defraud" in section 1341 to include a scheme or artifice to "deprive another of the intangible right of honest services." The defendants do not deny that Hollinger was entitled to their

honest services. They were senior executives of Hollinger and owed the corporation fiduciary obligations, implying duties of loyalty and candor. It is not as if Black had merely been using his power as controlling shareholder to elect a rubber-stamp board of directors or to approve a merger favorable to him at the expense of the minority shareholders. He was acting in his capacity as the CEO of Hollinger when he ordered Kipnis to draft the covenants not to compete and when he duped the audit committee and submitted a false 10-K. On his own theory, the fees that he collected, which the jury was entitled to find were never owed to him, were management fees rather than dividends. The defendants' unauthorized appropriation of $5.5 million belonging to a subsidiary of Hollinger was a misuse of their positions in Hollinger for private gain, which is just the kind of conduct that we said in *United States v. Bloom*, 149 F.3d 649, 655-57 (7th Cir. 1998), was the essence of honest services fraud. See also *United States v. Hausmann*, 345 F.3d 952, 955-57 (7th Cir. 2003); *United States v. Rybicki*, 354 F.3d 124, 141-42 (2d Cir. 2003) (en banc).

So if the jury found such a misappropriation, this would mean that the defendants, having both deprived their employer of its right to their honest services and obtained money from it as a result, were guilty of both types of fraud. *United States v. Turner*, 465 F.3d 667, 678- 79 (6th Cir. 2006); *United States v. Caldwell*, 302 F.3d 399, 408 (5th Cir. 2002). Nothing is more common than for the same conduct to violate more than one criminal statute. But the section 1346 instruction, which we quoted, did not require that the jury find that the defendants had taken any money or property from Hollinger; all it had to find to support a conviction for honest services

fraud was that the defendants had deliberately failed to render honest services to Hollinger and had done so to obtain a private gain. The defendants do not deny that they sought a private gain. But they presented evidence that it was intended to be a gain purely at the expense of the Canadian government. They argue that for the statute to be violated, the private gain must be at the expense of the persons (or other entities) to whom the defendants owed their honest services—a group not argued to include the Canadian government.

They are making a no harm-no foul argument, and such arguments usually fare badly in criminal cases. Suppose your employer owes you $100 but balks at paying, so you help yourself to the money from the cash register. That is theft, e.g., *State v. Winston*, 295 S.E.2d 46, 51 (W. Va. 1982); *Edwards v. State*, 181 N.W.2d 383, 387-88 (Wis. 1970); *State v. Self*, 713 P.2d 142, 144 (Wash. App. 1986), even though if the employer really owes you the money you have not harmed him. You are punishable because you are not entitled to take the law into your own hands. Harmlessness is rarely a defense to a criminal charge; if you embezzle money from your employer and replace it (with interest!) before the embezzlement is detected, you still are guilty of embezzlement.

The application of this principle to honest services mail and wire fraud is straightforward. As explained in *United States v. Orsburn*, *supra*, 525 F.3d at 546, section 1346 was added "to deal with people who took cash from third parties (via bribes or kickbacks). *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987), supplies a good example. Judge Holzer accepted bribes from litigants. What he took

from his employer, the state's judicial system, was the honest adjudication service that the public thought it was purchasing in exchange for his salary." See also *United States v. Sorich*, 523 F.3d 702, 707-08 (7th Cir. 2008); *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007); *Man-Seok Choe v. Torres*, 525 F.3d 733, 737 (9th Cir. 2008); *United States v. Kemp*, 500 F.3d 257, 279-80 (3d Cir. 2007); *United States v. Rybicki*, *supra*, 354 F.3d at 139-42. Similarly, if the defendants in this case deprived their employer, Hollinger, of the honest services they owed it, the fact that the inducement was the anticipation of money from a third party (the anticipated tax benefit) is no defense.

This case is different from those we have cited because Canada was not bribing the defendants with the offer of a tax benefit. But the distinction is unrelated to anything in the text or purpose of section 1346. The grant of a tax benefit is a purposive act, which confers a benefit on the grantor just as a voluntary transfer of money or property to him does; in fact it *is* a voluntary transfer of money. The defendants do not argue that they were trying to defraud Canada; they argue that their recharacterization of management fees as compensation for granting covenants not to compete was proper under Canadian tax law, even if the receipt of the payments violated American law. Canada, they contend in effect, was willing to "pay" the defendants in the form of a tax benefit in order to advance Canadian policy.

And if the defendants were trying to defraud Canada, that augmentation of their wrongdoing would not help their case. Suppose a third party

gives a bribe to a buyer for a department store, and the buyer pockets the bribe but does not carry out his side of the bargain, which was that he would purchase supplies from the principal of the person who bribed him. The buyer has deprived his employer (the department store) of his honest services, and has done so for private gain, but he has conferred no benefit on a third party. Judges who accept bribes invariably argue that they didn't allow the bribes to influence their decisions. But a judge who accepts bribes deprives the judiciary of his honest services even if, as contended by Francis Bacon, the most famous of corrupt judges, he does nothing for the person who bribed him. Such a case does not differ materially from that of the "honest" recipient of a bribe—the recipient who, committed to honor among thieves, performs his side of the illegal bargain.

Notice, too, how honest services fraud bleeds into money or property fraud. In the procurement case, the eagerness of the seller's agent to make a sale might enable the purchasing agent to negotiate a better price, to the financial benefit of his employer; instead he takes the "better price" in the form of a bribe. In this case, had the defendants disclosed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net the defendants a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees. If $10 in tax-free income is worth $15 to the recipient in taxed income, the employer who learns about the tax break may require the employee to accept in tax-free income less than $15 in taxed income.

This is not to say that every corporate employee must advise his employer of his tax status. But the defendants had a duty of candor in the conflict-of-interest situation in which they found themselves. Instead of coming clean they caused their corporation to make false filings with the SEC, and they did so for their private gain. Such conduct is bound to get a corporation into trouble with the third party and the SEC.

Even if our analysis of honest services fraud is wrong, the defendants cannot prevail. There is no doubt that the defendants received money from APC and very little doubt that they deprived Hollinger of their honest services; whether they also got (or hoped to get) a tax break from the Canadian government was not an issue at trial, as the defendants acknowledged, albeit backhandedly, when they said in their reply brief in this court that the theory "that defendants 'misused' their positions at [Hollinger] for personal gain in the form of Canadian tax benefits" was "the very theory the government propounded *up to the eve of trial*" (emphasis added). It was not the government's theory at trial.

The defendants point out that *Yates v. United States*, 354 U.S. 298 (1957), held that if the instructions permit the jury to convict of a nonexistent crime, the fact that they also permit it to convict of a genuine crime will not save a conviction declared in a general verdict. *United States v. Sorich*, *supra*, 523 F.3d at 706. That is different from a case in which two correct theories of illegality are presented in the instructions and there is sufficient evidence to convict only on one; the jury is assumed to have followed the instruction on the government's burden of proof and therefore to have

rejected the insufficiently supported theory. *Griffin v. United States*, 502 U.S. 46, 59- 60 (1991); *Tenner v. Gilmore*, 184 F.3d 608, 611 (7th Cir. 1999). But a jury that is given an illegal instruction cannot be assumed not to have followed it, since juries are neither authorized nor competent to make judgments of law.

An error in jury instructions is subject to the harmless-error doctrine. E.g., *Pope v. Illinois*, 481 U.S. 497, 502-03 (1987); *United States v. Ramsey*, 406 F.3d 426, 432 (7th Cir. 2005). Submitting an illegal theory to the jury may or may not be subject to it; it is an issue on which the courts of appeals are divided. Compare *United States v. Cappas*, 29 F.3d 1187, 1192-93 (7th Cir. 1994), and *United States v. Holly*, 488 F.3d 1298, 1305-06 n. 3 (10th Cir. 2007), with *Lara v. Ryan*, 455 F.3d 1080, 1085 (9th Cir. 2006), and *United States v. Edwards*, 303 F.3d 606, 641-42 (5th Cir. 2002). But giving an instruction that omits a qualification required to make it unambiguously correct is different from submitting a case to a jury on an erroneous theory of criminal liability. The prosecution did not ask the jury to convict the defendants because their private gain was at Canada's expense. The government's honest services theory was straightforward. It was that the defendants had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete. Had the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them.

If the jury had been given a special verdict that separated the two types of fraud, and had indicated

on the verdict that the defendants were not guilty of an honest services fraud, the challenge to the instruction would be moot. The defendants were not required to request a special verdict. But there is a wrinkle in this case that shows they forfeited their objection to the instruction: the *government* requested a verdict that would require the jury to make separate findings on money or property fraud and on honest services fraud. The defendants objected—they wanted a general verdict. In effect, they wanted to reserve the right to make the kind of challenge they are mounting in this court.

They are reduced to arguing that the judge *after* receiving the verdict should have told the jury to determine whether it had found both a money or property fraud and an honest services fraud. That procedure was tentatively approved by the Third Circuit in *United States v. Riccobene*, 709 F.2d 214, 228 n. 19 (3d Cir. 1983), although that court has since made clear that it is better to give the jurors the interrogatories on the same form as the verdict. *United States v. Hedgepeth*, 434 F.3d 609, 613-14 (3d Cir. 2006). Questioning the jurors after they have handed down their verdict is not a good procedure and certainly not one that a district judge is *required* to employ; nor has the Third Circuit so suggested. The defendants' proposal could if adopted create a nightmare in which the jury renders a general verdict; the jurors are polled and think they're about to be released from their term of indentured servitude—here four months—and be free to get on with their lives; and then they are told they must take an exam so that the judges and lawyers can know exactly how they evaluated the various theories presented to them in the instructions. Must

they resume deliberations? And if they disagree, what then—an *Allen* charge?

We turn to the obstruction of justice charge against Black. The charge is that he concealed or attempted to conceal documents "with the intent to impair the [documents'] integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(c)(1). There was evidence that Black knew that the alleged frauds were being investigated by a grand jury and by the SEC. In the midst of these proceedings Black with the help of his secretary and his chauffeur removed 13 boxes of documents from his office, put them in his car, was driven home, and helped carry them from the car into his house. He later returned them, but no one knows whether the boxes he returned contained all the documents that had been in them when he removed them from his office. It is true that copies were available to the government before the boxes were removed, but it was material to the investigation whether Black had had copies in his office. For that would mean that he had received them, in which event his denials of knowledge of their contents would be undermined.

Anyway, the statute does not require proof of materiality, *United States v. Ortiz*, 367 F. Supp. 2d 536, 542-44 (S.D.N.Y. 2005), affirmed without opinion, 220 Fed. App'x 13 (2d Cir. 2007), for the excellent reason that being able to deny the materiality of a document is the usual reason for concealing the document. All that need be proved is that the document was concealed in order to make it unavailable in an official proceeding. *See, e.g.*, *United States v. Senffner*, 280 F.3d 755, 762 (7th Cir. 2002); *United States v. Lessner*, 498 F.3d 185, 197-98 (3d Cir. 2007); *United States v. Tampas*, 493 F.3d

1291, 1300-01 (11th Cir. 2007). The evidence of that was ample. Black's secretary testified that Black intended to remove the documents to a temporary office that she would set up for him in her home because he had to vacate his office at Hollinger within 10 days. But this testimony was inconsistent with his having put the boxes in his car (not hers, which was at the scene) and taken them home. There was also evidence that in removing the boxes he tried to avoid the surveillance cameras in the building—unsuccessfully.

Three more issues need to be discussed. The first is whether an "ostrich" instruction should have been given. The reference of course is to the legend that ostriches when frightened bury their head in the sand. It is pure legend and a canard on a very distinguished bird. Zoological Society of San Diego, *Birds*: *Ostrich*, www.sandiegozoo.org/animalbytes/t-ostrich.html (visited June 12, 2008) ("When an ostrich senses danger and cannot run away, it flops to the ground and remains still, with its head and neck flat on the ground in front of it. Because the head and neck are lightly colored, they blend in with the color of the soil. From a distance, it just looks like the ostrich has buried its head in the sand, because only the body is visible"). It is too late, however, to correct this injustice.

An ostrich instruction tells the jury that to suspect that you are committing a crime and then take steps to avoid confirming the suspicion is the equivalent of intending to commit the crime. E.g., *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990). Suppose you *think* you've rented your house to a drug gang, but to avoid confirming your supposition you make sure not to drive near the

house, where you might observe signs of drug activity. That would be the equivalent of knowledge that you had rented the house to the gang. It would be a case of *physical* avoidance of confirmation of one's suspicions but there is also *psychological* avoidance, which is the type alleged here and which requires the jury's "distinguishing between a defendant's mental effort of cutting off curiosity, which would support an ostrich instruction, and a defendant's simple lack of mental effort, or lack of curiosity, which would not support an ostrich instruction." *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006). It is the distinction between willful ignorance and ordinary ignorance.

The defendants argue that either they knew they were taking money that they were not entitled to, or they were entitled to it; there is no middle ground. But there is. Remember that the defendants received the payments in question not from Hollinger but from APC, which the evidence showed did not owe them any management fees. If you receive a check in the mail for $1 million that you have no reason to think you're entitled to, you cannot just deposit it and when prosecuted for theft say you didn't know you weren't entitled to the money—that it might have been a random gift from an eccentric billionaire. You would have strongly suspected that you weren't entitled to the money and you would therefore have a duty to investigate. By shutting your eyes you tacitly confessed your all-but-certain knowledge that you were stealing the money. *United States v. Orsburn*, *supra*, 525 F.3d at 545 ("The embezzled funds were roughly twice the couple's legitimate income, and they spent it all. Michael could hardly avoid noticing this sudden improvement in the couple's fortunes even if he never looked at

bank statements"); *United States v. Rogers*, 289 F.2d 433, 438 (4th Cir. 1961); 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.2(g), pp. 71-72 (2d ed. 2003).

The defendants argue that the judge gave an inadequate limiting instruction with respect to the jury's use of the false filings with the SEC. The instruction, although correct, was abrupt: "You have heard evidence in this case regarding the disclosures of non-competition payments in Hollinger International's quarterly and annual reports and proxy statements in 2001 and 2002. The defendants in this case are not charged with securities fraud." It was important for the jury to understand that it could use the false filings to infer that the defendants had been trying to conceal their receipt of the payments but that the filings themselves were not charged as crimes.

The defendants proposed a misleading instruction as an alternative. It substituted for the second sentence ("The defendants in this case are not charged with securities fraud") the following: "The defendants are not charged with making false or misleading statements in these filings, and you may not conclude that a defendant is guilty of mail or wire fraud based on any alleged false statements or omissions in any of these filings." The defendants *were* "charged," in the sense of accused, of making false statements in these filings. And the jury *was* entitled to base a judgment of guilt "on any alleged false statements or omissions in any of these filings," provided that the false statement or omission was material to the alleged mail or wire fraud. At argument, the lawyer who had proposed the instruction told us at first that he had made other,

oral submissions as well. But when reminded that he had said in his brief that he had "proposed a series of limiting instructions, culminating with this request for the final charge"—the proposed instruction that we quoted—he backed off.

If one party submits an instruction that is accurate but could be made clearer, and the other party submits a misleading instruction, the judge can go with the first instruction. Not that the cases require "that a submitted charge be technically perfect to alert the court to the need for a particular charge." *Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983); see also *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 9-10 (1st Cir. 1998). But given the number and skill of the defendants' lawyers, the misleading character of their proposed instruction cannot be regarded as a merely "technical" failing, as opposed to an effort to mislead. Nor was the judge's instruction erroneous; it was merely terse.

Defendant Kipnis, the least culpable of the defendants, as indicated by the light sentence he received (though any felony conviction is likely to be devastating for a lawyer), complains that he should have been acquitted because he knew nothing about the management fees and had nothing to gain from the fraud. The last point has no merit, since Black controlled Hollinger and therefore held Kipnis's fate in his hands. The first two points are really just one point, with respect to which the ostrich instruction was decisive. It was he who prepared the agreement that purported to grant covenants not to compete in exchange for $5.5 million. He knew that the covenants made no sense, since APC was on its way out of the newspaper business and the other grantors of the covenants not to compete were not about to

leave Hollinger to start a newspaper in Mammoth Lake. The jury was entitled to infer that Kipnis suspected a fraud, which he facilitated by his preparation of the agreement, but asked no questions lest his suspicion rise to a certainty. He buried his head in the sand.

The defendants raise some other points in their 161 pages of briefs, but none that has sufficient merit to require discussion. The judgments are

AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTREE and MARK S. KIPNIS, Defendants-Appellants.

No. 07-4080, 08-1030, 08-1072, 08-1106

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2008 U.S. App. LEXIS 17595

August 13, 2008, Decided

* * *

JUDGES: Before Richard A. Posner, Circuit Judge, Michael S. Kanne, Circuit Judge, Diane S. Sykes, Circuit Judge.

ORDER

On July 16, 2008, defendants-appellants filed a petition for rehearing with suggestion for rehearing *en banc*, and on July 31, 2008, plaintiff-appellee filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has

requested a vote on a petition for rehearing *en banc*.* The petition is therefore **DENIED.**

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* Circuit Judges Joel M. Flaum, Ilana Diamond Rovner and Ann Claire Williams did not participate in the consideration of this petition for rehearing.

APPENDIX C

TITLE 18 –CRIMES AND CRIMINAL PROCEDURE

CHAPTER 63 – MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20

years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX D

TITLE 18 –CRIMES AND CRIMINAL PROCEDURE

CHAPTER 63 – MAIL FRAUD

§ 1346. Definition of "scheme or artifice to defraud"

For purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

APPENDIX E

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 30. Jury Instructions.

(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

(b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

(d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

APPENDIX F

FILED
JAN 10 2007
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
v.	)	Violations: Title 18 United States Code,
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON and MARK S. KIPNIS,	)	Sections 1341, 1343, 1346, 1512, 1957, 1962 and 2; Title 26, United States Code, Section 7206(2)
	)	Hon. Amy J. St. Eve.

Superseding Information

COUNT ONE

The UNITED STATES ATTORNEY charges:

1. At times material herein:

The Entities and Individuals

a. Hollinger International, Inc. ("International") was a Delaware corporation with an office located in

Chicago, Illinois. International was a holding company that was publicly traded on the New York Stock Exchange. Through its operating subsidiaries, International owned and published newspapers around the world, including the *Chicago Sun-Times*, *The Daily Telegraph* in the United Kingdom, the *National Post* in Toronto, the *Jerusalem Post* in Israel, and numerous community newspapers in the United States and Canada. International had a Board of Directors and an Audit Committee that met regularly to conduct business. The Audit Committee, which consisted of three independent directors, functioned as International's independent director committee for purposes of reviewing and approving the fairness of transactions between International and its controlling shareholders, officers and/or directors commonly referred to as "related party transactions."

b. Delaware corporate law imposes a fiduciary duty of loyalty on controlling shareholders, officers and directors of Delaware corporations such as International that forbids them from using their position of trust and confidence to further their private interests. Furthermore, this fiduciary duty forbids controlling shareholders, officers and directors from usurping corporate opportunities for their own personal benefit, or misleading or deceiving the corporation's board of directors. Controlling shareholders, officers and directors seeking to engage in related party transactions with a company under their control must disclose all material facts to the independent directors of the company and abide by the determination of those directors as to the fairness of the transaction. Such fiduciaries must ensure that all such related party transactions are "entirely fair," meaning that the

transaction was both procedurally and substantively fair to the company.

c. Hollinger Inc. ("Inc.") was a Canadian corporation with its principal office located in Toronto, Canada. Inc. was a holding company that was publicly traded on the Toronto Stock Exchange. Inc.'s primary asset was its interest in International, which it held directly and through various subsidiaries. Throughout the relevant time period, Inc. held approximately 30% of International's equity, but still controlled a majority of International's stock voting power. This disproportionate voting power existed because most of Inc.'s shares in International were in the form of Class B common stock that had a 10-1 voting preference over the Class A common shares held by International's public shareholders. Thus, Inc. was the controlling shareholder of International even though it owned a minority of the equity interest. As a controlling shareholder, Inc. had a fiduciary duty of undivided loyalty to International, which among other things, required Inc. to refrain from acting to benefit itself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and Inc.

d. The Ravelston Corporation Limited ("Ravelston") was an Ontario corporation with its principal office located in Toronto, Canada. Ravelston was a privately held corporation, with 98.5 % of its equity owned by officers and directors of International and Inc., and 1.5% owned by the estate of a former Inc. director. Ravelston's principal asset was its controlling interest in Inc., which it held directly and through various subsidiaries, and which

was approximately 78% of Inc.'s equity during the relevant time period. Thus, Ravelston was the controlling shareholder of International through its controlling interest in Inc. As the controlling shareholder, Ravelston had a fiduciary duty of undivided loyalty to International, which among other things, required Ravelston to refrain from acting to benefit itself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and Ravelston.

e. Defendant CONRAD M. BLACK, who was trained as an attorney, was a Canadian citizen until 1999, when he became a dual citizen of Canada and the United Kingdom. In 2000, BLACK became a member of the House of Lords in the United Kingdom. Black resided in Toronto, London and Palm Beach, Florida. In addition, during the relevant time period, he often stayed at an apartment in New York City. The apartment was owned by International until December 2000, at which time BLACK purchased the apartment from International. BLACK, through Conrad Black Capital Corporation, owned approximately 65.1% of Ravelston. BLACK was Chief Executive Officer and Chairman of the Board of Directors of Ravelston, Inc. and International. At International, BLACK's duties were to oversee International's operations, finances and corporate strategy, including all significant acquisitions and sales of assets. As a controlling shareholder, officer and director of International, BLACK had a fiduciary duty of undivided loyalty to International, which among other things, required BLACK to refrain from acting to benefit himself or anyone else at International's expense, and to

disclose all material facts to International's independent directors regarding any transactions involving International and any of International's officers, directors and controlling shareholders.

f. Defendant JOHN A. "Jack" BOULTBEE, who was a Chartered Accountant in Canada, was a Canadian citizen who resided in the Toronto area. BOULTBEE, through Mowitza Holdings, Inc., owned approximately .98% of Ravelston. BOULTBEE was: (1) Chief Financial Officer of Ravelston; (2) Chief Financial Officer, Executive Vice President and a director of Inc.; and (3) Executive Vice President and, for a period of time, Chief Financial Officer, of International. At International, BOULTBEE's principal duties were to oversee finances, including matters relating to taxes. As an officer of International, BOULTBEE had a fiduciary duty of undivided loyalty to International, which among other things, required BOULTBEE to refrain from acting to benefit himself for anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and any of International's officers, directors and controlling shareholders.

g. Defendant PETER Y. ATKINSON, who was a licensed attorney in Canada, was a Canadian citizen who resided in the Toronto area. ATKINSON owned .98% of Ravelston. ATKINSON was Vice President and General Counsel of Inc., and Executive Vice President of International. ATKINSON's principal duties at International were to oversee legal affairs. As an officer of International, ATKINSON had a fiduciary duty of undivided loyalty to International, which among other things, required

ATKINSON to refrain from acting to benefit himself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and any of International's officers, directors and controlling shareholders.

h. Defendant MARK S. KIPNIS was a United States citizen and an experienced attorney licensed in Illinois to practice law. KIPNIS has a B.S. degree in accounting and has been an attorney specializing in transactional law since 1974. KIPNIS was Vice President, Corporate Counsel and Secretary of International, and worked at International's office in Chicago. In this position, KIPNIS's duties included: (1) documenting and closing the purchases and sales of newspapers by International and its subsidiaries; (2) preparing International's annual proxy statement, which was distributed to International's shareholders in advance of International' s annual shareholder meeting and which was filed with the United States Securities and Exchange, Commission ("SEC"); (3) acting as secretary at meetings of International's Board of Directors and Audit Committee, and as keeper of the official corporate minute books; (4) preparing the agenda and collecting materials for the directors in connection with the meetings of International's Board of Directors and Audit Committee, and distributing the agenda and materials to the directors in advance of the meetings; and (5) presenting all related party transactions to International's Audit Committee, which functioned as International's independent director committee, for its review and approval. As International's in-house attorney, KIPNIS had a fiduciary duty of undivided loyalty to International, which among other things, required KIPNIS to

disclose all material facts regarding all related party transactions to International's Audit Committee, and to refrain from assisting others in any breach of fiduciary duty against International.

i. F. David Radler was a Canadian citizen who resided in Vancouver, Canada. During the relevant time period, he often stayed at an apartment in Chicago that was owned by International, and often worked at International's office in Chicago. Radler, through FDR Ltd.,, owned approximately 14.2% of Ravelston, of which he was President. Radler was the Deputy Chairman of the Board of Directors, the President and the Chief Operating Officer of both International and Inc. At International, Radler's principal duties were to manage the newspaper operations of the company in the United States and parts of Canada. On those occasions when International or its subsidiaries bought or sold newspapers, Radler often was involved in negotiating the business terms of those transactions. As an officer and director of International, Radler had a fiduciary duty of undivided loyalty to International, which among other things, required Radler to refrain from acting to benefit himself or anyone else at International's expense, and to disclose all material facts to International's independent directors regarding any transactions involving International and any of International's officers, directors and controlling shareholders.

Ravelston's Management of International

j. BLACK, Radler, BOULTBEE and ATKINSON were not employees of International, but rather of Ravelston. The services of these executives, along with certain accounting, financial reporting and other administrative functions, were provided by

Ravelston to International pursuant to a management services agreement between the two companies. The management services agreement, which was signed by KIPNIS on behalf of International and was dated as of January 1, 1998, provided that International and Ravelston would meet at least annually to determine whether Ravelston would continue to provide these services to International and at what fee. The fee was to be determined through negotiations between Ravelston and a committee of International's independent directors. In the agreement Ravelston represented and promised that it would discharge its duties thereunder honestly, in good faith, and in the best interest of International. The agreement further stated that Ravelston would provide the details of any conflict of interest involving Raveiston's performance of its management services to the Secretary of International, namely KIPNIS, whose job and fiduciary duty it was to present all material facts concerning all related party transactions to International's Audit Committee for its review and approval. Unless specifically authorized by international's Audit Committee, BLACK, Radler, BOULTBEE and ATKINSON received all of their compensation for their work at International, including all bonuses, from Ravelston.

k. Through his controlling interest in Ravelston, BLACK had an indirect ownership interest in Inc. of approximately 51%. Additionally, through his ownership interest in Inc., BLACK had an indirect ownership interest in International of approximately 15%. Despite having only a minority ownership in International, BLACK was able to maintain voting control over International though Inc.'s ownership of International's "super-voting"

Class B Common Stock. The result of International's ownership structure was that every $100 transferred out of International and into Inc. would effectively "cost" (BLACK) $15 but give him $51 as Inc.'s controlling shareholder, thereby tripling his funds at the direct expense of International's non-controlling shareholders. Similarly, every $100 that was transferred out of International and into Ravelston again would cost BLACK $15, but give him $65. As for funds transferred out of International directly to BLACK, he would receive the full amount of the funds, forgoing his 15% equity stake in International. Thus, BLACK was in a position to exert both his management position and voting control at International to transfer money to himself, and away from International's non-controlling and public shareholders, at a very low cost given his minority equity stake in International.

U.S. Community Asset Sales and Non-Competition Agreements

1. Starting in May of 1998, and continuing through 2001, International embarked on a business plan to sell off nearly all of its United States community newspaper assets. In May 1998, an International subsidiary sold a publication called *American Trucker* and several other smaller publications to Intertec Publishing Company for a total amount of approximately $75 million ("the *American Trucker* transaction"). In addition, from early 1999 through late 2000, International and its subsidiaries sold virtually all of International's United States community newspapers (except for those in the Chicago metropolitan area), in a series of sales to a variety of purchasers. These transactions were as follows:

Purchaser	Total Amount (approx.)	Closing Date	Referred To Herein As
Community Newspaper Holdings, Inc.	$472 million	2/1/99	"CNHI 1"
Horizon Publications, Inc.	$43.7 million	3/31/99	"Horizon"
Forum Communications, Inc.	$14 million	9/30/00	"Forum"
PMG Acquisition Corp.	$59 million	10/2/00	"Paxton"
Newspaper Holdings Inc.	$90 million	11/1/00	"CNHI II"

Newspaper Holdings Inc. was a subsidiary of Community Newspaper Holdings Inc. Horizon Publications Inc. was owned by Radler, KIPNIS and other International executives. None of the other purchasers had any ownership relationship to or with International.

m. Radler supervised the negotiations of the business terms of each of the transactions set forth in subparagraph k. KIPNIS participated in the documentation and closing of each transaction.

n. The closing documents for each of the transactions set forth in subparagraph k. included a non-competition agreement signed by International, whereby International promised not to acquire or establish a newspaper within a certain geographic distance from the newspapers it sold for a certain period of time after the sale. It was not unusual for transactions in the newspaper business to include a

non-competition agreement signed by the seller. This was so because newspaper purchasers buy not just the trade name of the newspaper, but also its subscriber and advertiser bases. Purchasers often request the seller's agreement not to return to the same area in a short period of time and operate a rival newspaper. For commercial and tax purposes, it is not unusual for the buyer and seller to allocate a portion of the sales proceeds towards the seller's non-competition agreement. The buyer, however, typically does not pay additional consideration for a separate agreement that prohibits the seller's affiliates and officers from personally competing with the buyer.

o. In connection with the non-competition agreements in the transactions set forth in subparagraph 1, the fiduciary duty of loyalty owed by BLACK, BOULTBEE, ATKINSON, KIPNIS and Radler to International required each of them to use his skill and ability to maximize International's share of the proceeds allocated to the non-competition agreement and to refrain from acting to International's detriment. If one of International's controlling shareholders, officers or directors received a portion of the proceeds allocated to the non-competition agreement, all of the above-named defendants and Radler and Ravelston, as well as any other knowledgeable officer, director or controlling shareholder of International, had a fiduciary duty to disclose this fact to International's Audit Committee, so that the independent directors could review the transaction and ensure its fairness to International.

p. In 1996, a tax court in Canada held that, under the facts of that case, non-competition fees were not taxable under Canadian tax law. In

December 1999, a Canadian federal court of appeal affirmed this decision. These court decisions created a potential tax benefit for Canadian taxpayers who legitimately received non-competition payments. BLACK, BOULTBEE, ATKINSON and Radler were Canadian taxpayers. BOULTBEE was extremely knowledgeable about tax law and was the architect of much of the tax strategy employed by International, Inc, and the defendants.

SEC Disclosures

q. As a publicly traded company, International was obligated to make regular filings with the United States Securities and Exchange Commission ("SEC"), and was obligated in those filings to disclose all material facts about the company to investors. Among other things, International was required to fully and accurately disclose in its SEC filings related party transactions and compensation paid to its officers and directors.

General Scheme Allegations

2. Beginning no later than in or about January 1999 and continuing thereafter until at least in or about May 2001, at Chicago, in the Northern District of Illinois, Eastern Division and elsewhere,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with others known and unknown to the grand jury, devised, intended to devise, and participated in a scheme to defraud International and International's public shareholders of money, property and their intangible right of honest services, and to obtain money and

property from these victims by means of materially false and fraudulent pretenses, representations, promises and omissions, in connection with the U.S. Community Newspaper Asset Sales. This scheme is further described below.

3. It was part of the scheme that, in connection with the U,S. Community asset sales, Ravelston and its agents, including BLACK, BOULTBEE, ATKINSON and Radler, repeatedly abused their authority and fiduciary obligations as managers of International in order to fraudulently benefit themselves at the expense of International and its public shareholders. On multiple occasions, Ravelston's agents fraudulently inserted themselves and Inc. as recipients of non-competition fees that should have, and otherwise would have, been paid exclusively to international. Ravelston and its agents failed to disclose their self dealing to International's Audit Committee, thereby enabling Ravelston and its agents to conceal the scheme, continue as International's managers, and quietly siphon away International assets. Ravelston's agents also abused their positions as International's managers by fraudulently causing International to mischaracterize bonus compensation payments to them as non-competition fees, in order to receive a tax benefit in Canada. KIPNIS aided and abetted this scheme by implementing the directives of Ravelston's agents and by failing to disclose this misconduct to International's Audit Committee. As a result of this scheme, defendants and their co-schemers fraudulently diverted over $32 million from International, and fraudulently deprived International of its right to receive their honest services.

American Trucker

4. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others defrauded International in connection with the *American Trucker* transaction. On or about May 11, 1998, International (through a subsidiary) sold the *American Trucker* and *Mine and Quarry Trader* publications to Intertec Publishing Corporation ("Intertec") for approximately $75 million. The closing documents provided that $2 million of the sales proceeds was being paid to International as consideration for its assent to a non-competition agreement. Radler signed the asset purchase agreement and non-competition agreement on behalf of International. Intertec did not request or receive a non-competition agreement from Inc. as part of the transaction.

5. It was further part of the scheme that in or about January 1999, approximately eight months after the *American Trucker* transaction was concluded, Ravelston's agents, including BLACK, BOULTBEE and Radler, decided that they would divert the $2 million that International received for the *American Trucker* non-competition agreement to Inc. Consistent with this decision, Ravelston's agents caused the Executive Vice-President of International's Community Newspaper Division to send a memorandum, on January 27, 1999, to the Assistant Treasurer of International on which Radler was copied. The memorandum falsely stated that the $2 million from the *American Trucker* deal allocated to International's non-competition agreement "was actually for [Inc.] as compensation for the Non-Compete as specified in the *American Trucker* transaction."

6. It was further part of the scheme that on or about February 1, 1999, KIPNIS signed a $2 million check that International issued and sent to Inc. These funds purportedly represented the entire $2 million non-competition agreement allocation from the *American Trucker* transaction to Inc. as compensation for Inc.'s assent to a non-competition agreement. Ravelston's agents and KIPNIS knew that Inc. had never signed or been asked to sign a non-competition agreement in the *American Trucker* transaction. Furthermore, Inc. did not present a competitive threat to any of the publications sold in the *American Trucker* transaction, and Inc. did not employ staff who could manage newspaper properties in the United States other than the staff already working for International, which was already subject to the non-competition agreement.

7. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others failed to disclose the $2 million payment from International to Inc. as a related party transaction to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme. The $2 million payment to Inc. was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from the *American Trucker* transaction. The $2 million payment was a theft of International's corporate assets and a fraudulent deprivation of honest services by all International agents who were involved. Ravelston benefitted by these thefts because it owned a greater percentage of Inc. than it did of International. Thus, by fraudulently moving

the non-compete proceeds of the *American Trucker* transaction "up" from International to Inc., Ravelston and its controlling shareholders would effectively receive a larger portion of the non-compete proceeds than they would have otherwise received.

CNHI 1

8. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others defrauded International in connection with the CNHI 1 transaction. On or about February 1, 1999, International sold certain of its newspaper assets to Community Newspaper Holdings, Inc. ("CNHI") for approximately $472 million. The deal letter for the CNIII 1 transaction, signed in December 1998, provided that International would sign a non-competition agreement and that $50 million of the transaction proceeds would be paid to International as consideration for its covenant not to compete.

9. It was further part of the scheme that in or about January 1999, Ravelston's agents, including BLACK, BOULTBEE and Radler, decided that Inc. would be inserted as a non-competition covenantor, and that Inc. would receive $12 million of the $50 million allocated to the non-competition agreement (approximately 25%). BLACK, BOULTBEE, Radler and KIPNIS were aware that CNHI had not requested that Inc. be added to the non-competition agreement.

10. It was further part of the scheme that in late-January 1999, only days before the February 1, 1999 closing, KIPNIS inserted Inc. into the closing documents as a non-compete covenantor. The final covenant not to compete falsely stated that CNHI

"was not willing to enter into the Exchange Agreement and Lenders are not willing to provide financing to [CNHI] for the acquisition of the Newspapers unless Covenantors execute this Agreement." KIPNIS signed the asset purchase agreement and non-competition agreement on behalf of International, and Radler signed the non-competition agreement on behalf of Inc. Both KIPNIS and Radler signed the non-competition agreements knowing full well that CNHI was willing to enter into the transaction without Inc.'s non-compete agreement.

11. It was further part of the scheme that at the closing of the CNHI 1 transaction on February 1, 1999, KIPNIS caused $12 million of the transaction proceeds to be wire transferred directly to Inc. instead of International. The $12 million payment to Inc. was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from the transaction. The $12 million payment was a theft of International's corporate opportunity and a fraudulent deprivation of honest services by all International agents who were involved. Ravelston benefitted by these thefts because it owned a greater percentage of Inc. than it did of International. The $12 million payment to Inc, at International's expense was a related party transaction. Ravelston, its agents and KIPNIS others failed to disclose this related party transaction to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

12. It was further part of the scheme that February 1999, Ravelston's agents caused Inc. to use the $14 million that it had fraudulently obtained in connection with the *American Trucker* ($2 million) and CNHI 1 ($12 million) transactions to pay down an overdue debt that Inc. owed to International. Thus, by "round-tripping" the funds that they had fraudulently obtained from International, Ravelston's agents had effectively caused International to repay itself a significant portion of Inc.'s overdue debt. The $14 million in payments to Inc. at International's expense, and Inc.'s subsequent use of those funds to "repay" International were related party transactions. Ravelsion and its agents failed to disclose these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

The Template

13. It was further part of the. scheme that, in or about January 1999, Ravelston's agents, including BLACK, BOULTBEE and Radler, decided that, in connection with all future sales of International's U.S. community newspapers, Inc. would be inserted as a non-compete covenantor as a matter of course, and would receive 25% of the proceeds allocated to the non-competition agreement in each transaction. This decision, of which KIPNIS was aware and helped implement, was known as the "template." KIPNIS was present at the time the decision to implement the template was made, and characterized it as having been made by "Toronto" – a reference to Ravelston's agents based in Toronto, Canada. The decision to initiate the template in all

future transactions would effectively siphon off 25% of any proceeds allocated to International's non-competition agreement regardless of whether the buyer requested or valued Inc.'s agreement not to compete. The implementation of the template was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to international from these transactions. The decision to create and implement the template, which would result in payments to Inc. at International's expense, also was a plan to engage in a series of related party transactions. Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others failed to disclose the plan to implement the template to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

Horizon

14. It was further part of the scheme that Ravelston, BLACK., BOULTBEE, Radler, KIPNIS and others defrauded International in connection with the Horizon transaction, Horizon was a privately-owned newspaper company in which BLACK and Radler owned substantial interests. In a transaction agreement dated March 31, 1999, International agreed to sell certain newspapers and specialty publications to Horizon for approximately $43.7 million. Ravelston's agents, including BLACK, BOULTBEE and Radler, decided that the amount allocated to the non-competition agreement would he $5 million, and that, pursuant to the template, both International and Inc. would sign the non-competition agreement, with International receiving $3.8 million of the non-competition allocation and

Inc, receiving $1.2 million of the non-competition allocation.

15. It was further part of the scheme that at the closing of the Horizon transaction, on June 30, 1999, KIPNIS helped implement the template by including Inc. in the transaction documents, and causing $1.2 million to be wire transferred to Inc. in August 1999 when Horizon received the funding necessary to close the transaction. KIPNIS signed the asset purchase agreement and non-competition agreement on behalf of International, and Radler signed the non-competition agreement on behalf of Inc. Thus, in the Horizon transaction, Ravelston's agents, including BLACK, BOULTBEE and Radler, had in essence, negotiated an agreement with themselves (Inc.), not to compete against themselves (Horizon), resulting in them paying themselves (Inc.) approximately $1.2 million. The $1.2 million payment to Inc. was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from the transaction. The $1.2 million payment was a theft of International's corporate opportunity and a fraudulent deprivation of honest services by all International agents who were involved. Ravelston again benefitted by this theft because it owned a greater percentage of Inc. than it did of International. The $1.2 million payment to Inc. at International's expense was a related party transaction, Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others failed to disclose this related party transaction to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

Individual Non-Competition Payments

16. It was further part of the scheme that, in the summer of 2000, BLACK, BOULTBEE, ATKINSON and Radler decided that, with respect to anticipated transactions with Forum, Paxton and CNHI II, they would insert themselves as individual non-compete covenantors and would divert a portion of the proceeds of each of these transactions to themselves as bonus compensation. The decision to characterize these payments as "non-competition" payments, as opposed to bonus compensation, was motivated; at least in part, by a desire to receive favorable tax treatment in Canada, where legitimate non-competition payments potentially received tax-advantaged treatment. These payments were to be above and beyond the funds allocated to the non-competition agreement in the transaction by the parties, which would continue to be divided between International and Inc, pursuant to the template. This decision, of which KIPNIS was aware and helped implement, was a breach of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from these transactions. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to disclose their plan to pay themselves bonus compensation and mischaracterized these payments as "non-competition fees" to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme at International's expense.

Forum and Paxton

17. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS defrauded International in connection with the Forum and Paxton transactions. On or about September 30, 2000, International entered into an Asset Purchase Agreement to sell certain newspapers to Forum Communications Co. for $14 million, $400,000 of which was allocated to non-competition agreements. On or about October 2, 2000, International entered into an Asset Purchase Agreement to sell certain newspapers to Paxton for approximately $59 million, $2 million of which was allocated to non-competition agreements. Pursuant to the template established by Ravelston's agents, in both transactions KIPNIS inserted International and Inc. as non-compete covenantors, and proposed that the amount allocated to the non-competition agreement be split 75% to International and 25% to Inc. As in prior transactions, Inc. was included as a non-compete covenantor because KIPNIS, purportedly acting on behalf of International, inserted it as such. Neither Forum nor Paxton ever requested that Inc. be included as a non-compete convenantor.

18. It was further part of the scheme that KIPNIS signed the Forum and Paxton asset purchase agreements on behalf of International, and the non-competition agreements on behalf of both International and Inc. At the closings on or about September 30, 2000 (Forum) and October 2, 2000 (Paxton), MINIS caused $100,000 and $500,000, respectively, to be wire transferred to Inc. The decision in the Forum and Paxton transactions to include Inc. as a recipient of 25% of the funds

allocated to the non-competition agreement, and the implementation of that decision, were breaches of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from these transactions. The $100,000 and $500,000 payments were thefts of International's corporate opportunities and fraudulent deprivations of honest services by all International agents who were involved. As in prior transactions, Ravelston benefitted by these thefts because it owned a greater percentage of Inc. than it did of International. The $100,000 and $500,000 payments to Inc. at International's expense were related party transactions. Ravelston, BLACK, BOULTBEE, Radler, KIPNIS and others failed to disclose these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

19. It was further part of the scheme that at the time of the Forum and Paxton transactions, Radler believed that, consistent with their plan, BLACK, BOULTBEE, ATKINSON and Radler had been inserted as non-compete covenantors by KIPNIS in the Forum and Paxton closing documents, and that 3% of the proceeds of each transaction had been set aside to fund the non-compete payments to the four International officers.

20. It was further part of the scheme that, in the spring of 2001, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS realized that a portion of the proceeds from the Forum and Paxton transactions had not, in fact, been set aside from the transactions to fund the anticipated individual non-compete

payments. Moreover, BLACK, BOULTBEE, ATKINSON and Radler had never been inserted as non-compete covenantors in the closing documents. After realizing the "mistake," Radler examined International's reserve accounts from the Forum and Paxton transactions - which had closed almost six months prior – and determined that $600,000 could diverted from those reserves and paid to BLACK, BOULTBEE, ATKINSON and Radler as non-competition payments.

21. It was further part of the scheme that on or about April 9, 2001, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS caused a subsidiary of International to pay a total of $600,000 to BLACK, BOULTBEE, ATKINSON and Radler as "supplemental non-competition payments." The "supplemental non-competition payments" were made to the defendants despite the fact that none of them had signed a non-competition agreement in connection with the Forum or Paxton transactions. These payments were thefts of International's corporate assets and fraudulent deprivations of honest services by all International agents who were involved. The payments to the individuals at International's expense also were related party transactions, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to disclose these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

CNHI II

22. It was further part of the scheme that Ravelston, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS defrauded International in

connection with the CNHI II transaction. On or about November 1, 2000, International sold additional newspapers to CNHI for approximately $90 million.

Pursuant to the "template" established by Ravelston's agents, Inc. was inserted into the CNHI asset purchase agreement by KIPNIS as a non-compete covenantor. The asset purchase agreement, dated September 28, 2000, allocated $3 million of the purchase price to International and Inc.'s non-competition agreements — $2.25 million to International (75%) and $750,000 to Inc. (25%). Inc. was included as a non-compete covenantor because KIPNIS, purportedly acting on behalf of International, inserted it as such. As in the first CNHI transaction, however, CNHI had not requested that Inc. be included as a non-compete covenantor in the transaction.

23. It was further part of the scheme that in or about late October of 2000, several days before the closing of the CNHI II transaction, KIPNIS, purportedly acting on behalf of International, advised CNHI representatives that International wanted to insert BLACK, BOULTBEE, ATKINSON and Radler as covenantors to the non-competition agreement (in addition to International and Inc.). CNHI agreed to allow the four individuals to be added to the non-competition agreement as covenantors, and the non-competition agreement was modified to reflect this fact. CNHI did not care if the number of covenantors was increased, so long as doing so did not increase CNHI's purchase price. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS were fully aware that CNHI had not requested that any individuals be added as

covenantors to the non-competition agreement with International. CNHI representatives had not even heard of some of the International officers whom KIPNIS proposed adding as covenantors to the non-competition agreement.

24. It was further part of the scheme that, just prior to the closing, BLACK directed Radler to allocate approximately $9.5 million of the transaction proceeds to the non-competition agreements for BLACK, BOULTBEE, ATKINSON and Radler. Radler conveyed this directive to KIPNIS. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS were fully aware that the $9.5 million allocated to the individuals as compensation for non-competition agreements would have otherwise been paid to International as proceeds of the CNHI II transaction.

25. It was further part of the scheme that at the closing on or about November 1, 2000, KIPNIS signed the asset purchase agreement on behalf of International, and the non-competition agreements on behalf of International, Inc., BLACK, BOULTBEE, ATKINSON and Radler. Although Inc. and the four International officers were added to the non-competition agreement solely at KIPNIS' request, the final non-competition agreement falsely stated that CNHI "was not willing to enter into the Purchase Agreement for the acquisition of the Newspapers unless Covenantor executes this Agreement." KIPNIS signed the non-competition agreement knowing full well that CNHI was willing to enter into the transaction without Inc. or the four individuals' non-compete agreement.

26. It was further part of the scheme that, at the closing on or about November 1, 2000, pursuant to

Inc.'s non-competition agreement, KIPNIS caused $750,000 to be wire transferred to Inc. Furthermore, at the closing on or about November 1, 2000, KIPNIS attempted to convince CNHI to wire transfer the $9.5 million non-competition payment directly to BLACK, BOULTBEE, ATKINSON and Radler. CNHI refused, in part because it had never heard of BOULTBEE or ATKINSON. CNHI, however, agreed to allow KIPNIS to handwrite the names and disbursement amounts for the four International officers receiving non-compete payments on the bank's wiring instructions. KIPNIS subsequently arranged for the $9.5 million in non-compete payments to be sent to American Publishing Company, a subsidiary of International.

27. It was further part of the scheme that in late November 2000, KIPNIS caused an American Publishing Company subsidiary to issue checks totaling $9.5 million to BLACK, BOULTBEE, ATKINSON and Radler. At the same time, KIPNIS also caused an American Publishing Company subsidiary to issue a bonus check to himself in the amount of $100,000. The decision in the CNHI II transaction to propose Inc. and the four International officers as recipients of the funds allocated to the non-competition agreement, and the implementation of that decision, were breaches of the fiduciary duty that defendants and their co-schemers owed to International, which required them to seek to maximize the benefit to International from the transaction. The $750,000 payment to Inc. and the $9.5 million payment to the four International officers were thefts of International's corporate opportunity and a fraudulent deprivation of honest services by all International agents who were involved. Ravelston and its agents benefitted by this

theft directly, and because they owned a greater percentage of Inc. than they did or International. The $750,000 payment to Inc. and the $9.5 million payment to the four International officers were both at International's expense and were related party transactions. Ravelston, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to disclose these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

February 2001 Payments

28. It was further part of the scheme that, in February 2001, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS fraudulently mischaracterized bonus payments to the four International officers as non-competition payments. The four International officers decided that they would pay themselves, purportedly on behalf of International, a bonus of $5.5 million. The four International officers further decided to label these payments as non-competition payments, rather than bonus compensation, in order to take advantage of the potential tax benefits that genuine non-competition payments received under Canadian tax laws.

29. It was further part of the scheme that KIPNIS helped implement this decision by preparing non-competition agreements between American Publishing Company (an International subsidiary) and each of the four International officers, and then signing the agreements on behalf of American Publishing Company. In the agreements, which were backdated to December 31, 2000, BLACK, BOULTBEE, ATKINSON and Radler each promised not to compete with American Publishing Company

for three years after he left International's employ. These agreements were a contrivance created for the purpose of facilitating favorable tax treatment from the Canadian tax authorities. American Publishing Company was the subsidiary through which International had owned its United States community newspapers outside the Chicago area. By the time these agreements were signed, however, International had sold all of these newspapers but one – a small weekly newspaper in Mammoth Lake, California. International was in the process of attempting to sell that newspaper and had no intent of re-entering the community newspaper business in the United States, and defendants knew that there was no legitimate justification for these non-competition agreements. BLACK, BOULTBEE, ATKINSON and Radler had signed a $5.5 million agreement not to compete in the newspaper business with a company that was, for all intents and purposes, no longer in the newspaper business.

30. It was further part of the scheme that, in or about February 2001, BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS caused an American Publishing Company subsidiary to issue checks totaling $5.5 million to BLACK, BOULTBEE, ATKINSON and Radler. KIPNIS arranged for the delivery of the checks which, like the non-competition agreements, were backdated to December 31, 2000. The issuance of these checks, as well as the preparation and signing of the fraudulent non-competition agreements, were breaches of the fiduciary duty owed by BLACK,. BOULTBEE, ATKINSON, Radler and KIPNIS because they were benefitting themselves to the detriment of International. These payments were fraudulent deprivations of International's right to receive honest

services from its officers, directors and controlling shareholder. The payments to the individuals at International's expense also were related party transactions. BLACK, BOULTBEE, ATKINSON, Radler and KIPNIS failed to investigate and fully disclose the actual nature of these related party transactions to International's Audit Committee, thereby breaching their fiduciary duty, fraudulently depriving International of honest services, and concealing the scheme.

32. It was further part of the scheme that defendants and their co-schemers used the United States mail, commercial interstate couriers and the interstate wires to execute the scheme. For example, KIPNIS sent transaction documents to others by interstate facsimile, e-mail and commercial interstate couriers. Money was wire transferred in interstate commerce. Checks were delivered by commercial interstate carriers. KIPNIS sent out packages of materials to the International Audit Committee by facsimile, e-mail and commercial interstate carriers.

33. It was further part of the scheme that defendants and their co-schemers did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, acts done in furtherance of the scheme and the purpose of those acts, beyond those acts of concealment set forth above.

34. On or about February 8, 2001, at Chicago, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with co-schemer F. David Radler, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, an envelope addressed to ATKINSON in Toronto, Canada, to be sent and delivered by an interstate carrier, namely, Federal Express, according to the directions thereon, which envelope contained Noncompetition Agreements with American Publishing Company to be executed by certain International officers, and approximately $2.9 million in checks as consideration for those agreements;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT TWO

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about August 19, 2000, at Chicago, in the Northern District of Illinois, Eastern Division,

MARK S. KIPNIS,

defendant herein, along with co-schemers Conrad M. Black, F. David Radler, John A. Boultbee, Peter Y. Atkinson and Ravelston, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, an envelope addressed to the attorney for Forum Communications Inc. in Fargo, North Dakota,

to be sent and delivered by an interstate carrier, namely: Federal Express, according to the directions thereon, which envelope contained a transaction documents relating to International's September 30, 2000 sale of certain newspapers to Forum, including a Noncompetition Agreement, wire transfer instructions for the Noncompetition Agreement and an Asset Purchase Agreement;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT THREE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about September 5, 2000, at Chicago, in the Northern District of Illinois, Eastern Division,

MARK S. KIPNIS,

defendant herein, along with co-schemers Conrad M. Black, F. David Radler, John A. Boultbee, Peter Y. Atkinson and Ravelston, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Nashville, Tennessee, to Chicago, Illinois, by means of wire and radio communications, certain writings, signs, and signals, namely: an e-mail transmission of a draft Asset Purchase Agreement for International's October 2, 2000 sale of certain newspapers to PMG Acquisition Corp. ("Paxton");

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT FOUR

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about October 24, 2000, at Chicago in the Northern District of Illinois, Eastern Division,

MARK S. KIPNIS,

defendant herein, along with co-schemers Conrad M. Black, F. David Radler, John A. Boultbee, Peter Y. Atkinson and Ravelston, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Charlotte, North Carolina, by means of wire and radio communications, certain writings, signs, and signals, namely: a facsimile transmission wire transfer instructions for the proceeds of International's November 1, 2000 sale of certain newspapers to CNHI;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT FIVE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs I through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about November 21, 2000, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with co-schemers F. David Radler and Ravelston, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to MARK S. KIPNIS, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained a "non-competition" payment, in the form of a check made payable to Radler in the amount of $4,300,000;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT SIX

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this indictment as though fully set forth herein.

2. On or about March 1, 2001, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with co-schemers F. David Radler and Ravelston, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for

delivery by an interstate carrier an envelope addressed to MARK S. KIPNIS, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained Non-Competition Agreements with American Publishing Company executed by certain International officers;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT SEVEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. On or about April 9, 2001, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK;
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with co-schemers F. David Radler and Ravelston, for the purpose of executing and attempting to execute the above-described scheme, knowingly did knowingly cause to he deposited for delivery by an interstate carrier an envelope addressed to MARK S. KIPNIS, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained "non-competition payments" in the form of checks totaling $600,000 made payable to BLACK, Radler, BOULTBEE and ATKINSON;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT EIGHT

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraph 1 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. In 2000, International sold several hundred Canadian newspapers, an internet investment called Canada.com, and a fifty percent interest in the *National Post* to CanWest Global Communications Corp. The purchase price was approximately $2.1 billion (Cdn. $3,2 billion). The negotiations began in or about May 2000. The transaction agreement was dated July 30, 2000. The transaction closed on or about November 16, 2000, Approximately 2/3 of the assets sold were owned solely by International,

b. BLACK negotiated the CanWest transaction. BOULTBEE, ATKINSON and KIPNIS participated in reviewing and finalizing the transaction. The transaction included non-competition agreements signed by International and others. The transaction documents for the CanWest transaction allocated approximately $51.8 million (Cdn. $80 million) to the non-competition agreements,

c. In connection with the non-competition agreements in the Can West transaction, the fiduciary duty of loyalty owed by BLACK, BOULTBEE, ATKINSON, KIPNIS, and Ravelston to International required each of them to use their skill and ability to maximize International's share of the

proceeds allocated to the non-competition agreement and to refrain from acting to International's detriment. If one of International's controlling shareholders, officers or directors received a portion of the proceeds allocated to the non-competition agreement, all of the above-named defendants and Radler, as well as any other knowledgeable officer, director or controlling shareholder of International, had a fiduciary duty to truthfully disclose all material facts to International's Audit Committee, and to refrain from making any false or fraudulently misleading statements, so that the independent directors could review the transaction and ensure its fairness to International.

General Scheme Allegations

Beginning no later than in or about May 2000 and continuing thereafter until at least in or about May 2002, at Chicago, in the Northern District of Illinois, Eastern Division and elsewhere,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, along with others known and unknown to the grand jury, devised, intended to devise, and participated in a scheme to defraud International and International's public shareholders of money, property and their intangible right of honest services, and to obtain money and property from these victims by means of materially false and fraudulent pretenses, representations, promises and omissions, in connection with the CanWest transaction. This scheme is further described below.

4. It was part of the scheme that, in connection with the CanWest transaction, BLACK, BOULTBEE and ATKINSON fraudulently inserted BOULTBEE and ATKINSON as non-compete covenantors and fraudulently caused approximately $51.8 million (Cdn. $80 million) of the sale proceeds to be allocated to the non-competition agreements. BLACK, BOULTBEE, ATKINSON, KIPNIS, and Ravelston failed to properly disclose this self-dealing to International's Audit Committee, and caused false and misleading statements to hc made to International's independent directors about the non-competition payments. Although International was the seller and signed a non-competition agreement, and International's Audit Committee was told that International would receive $2.6 million (Cdn. $4 million) for this agreement, the defendants caused all $51.8 million (Cdn. $80 million) -plus interest– to be distributed to BLACK, Radler, BOULTBEE, ATKINSON and Ravelston. International received nothing for its non-competition agreement. After an outside attorney discovered and questioned these payments during the course of a due diligence inquiry, BLACK., BOULTBEE, ATKINSON and K[PNIS returned to International's Audit Committee and sought ratification of the payments on different grounds, claiming that the information previously provided to the directors misdescribed the transaction in a number of "inadvertent" respects. In fact, the previous submission's falsehoods had not been inadvertent, and the second submission was false and misleading as well. After International's independent directors ratified these payments, BLACK then lied to International's shareholders about the payments at International 2002 annual shareholder meeting. As a result of this scheme,

defendants and their co-schemers fraudulently diverted approximately $51.8 million (Cdn. $80 million) from International, and fraudulently deprived International of its right to receive their honest services.

CanWest

5. It was further part of the scheme that, on or about July 28, 2000, BLACK, BOULTBEE and ATKINSON fraudulently caused BOULTBEE and ATKINSON to be inserted into the CanWest transaction agreement as non-Compete covenantors, and fraudulently caused approximately $51.8 million (Cdn. $80 million) of the sale proceeds to be allocated to the non-competition agreements. Prior to this date, CanWest had requested only that International, Ravelston, BLACK and Radler sign non-competition agreements, and the transaction agreement had not allocated any of the sales proceeds to such agreements. At the defendants' direction, the $51.8 million (Cdn. $80 million) that was allocated to the non-competition agreements was taken out of the proceeds that were to be paid to International as compensation for the newspapers that it was selling to CanWest.

6. It was further part of the scheme that BLACK, BOULTBEE and ATKINSON agreed that BOULTBEE and ATKINSON would be inserted as non-compete covenantors, and as recipients of non-competition fees, as a mechanism for causing International to pay them a bonus. Until this time, International had never paid BOULTBEE or ATKINSON a bonus; all of their compensation had been paid by Ravelston and funded by the management fees. The defendants decided to label these payments as non-competition payments, rather

than bonus compensation, in order to take advantage of the potential tax benefits that genuine non-competition payments received under Canadian tax laws.

7. It was further part of the scheme that, on or about September 2000, KIPNIS prepared and sent a memorandum to International's Audit Committee about the related party issues arising from the CanWest transaction ("the September memorandum"). The September memorandum was false and fraudulent in several respects:

- The September memorandum stated that $32.4 million (Cdn. $50 million) had been allocated to the non-competition agreements. In fact, the transaction agreement had allocated $51.8 million (Cdn. $80 million) to the non-competition agreements.
- The September memorandum stated that ATKINSON and BOULTBEE had been requested to execute non-competition agreements. In fact, CanWest had not requested that ATKINSON and BOULTBEE sign non-competition agreements they had been inserted by the defendants.
- The September memorandum stated that International would be paid $2.6 million (Cdn. $4 million) for its non-competition agreement. In fact, International received nothing for its non-competition agreement..
- The September memorandum proposed that Ravelston be paid $19.4 million (Cdn.

$30 million) as a "Management Agreement Break-Up Fee" (hereinafter referred to as "the break fee"). The memorandum stated that the break fee was appropriate because "Ravelston has a long term management agreement in place" with International, Ravelston had agreed to reduce its "ongoing" management fee which had the effect of increasing International's sale proceeds (because the sale proceeds were reduced by a multiple of the management fee going forward), and Ravelston had consented "to CanWest having an early termination of its management agreements." In fact, the CanWest transaction agreement did not refer in any way to a "management agreement break-up fee" – the money to be paid to Ravelston as a break fee was allocated in the transaction agreement to the non-competition agreements. Moreover, Ravelston's management agreement with International was not long-term; it provided that each year International's Audit Committee would decide whether to continue with Ravelston as its source of management services. Thus, Ravelston had no right to an "ongoing" management fee that it might forego. As for CanWest's right to terminate its management agreement with Ravelston, the memorandum failed to disclose that, if CanWest did so, Can West would have to pay Ravelston $29.1 million (Cdn. $45 million) whereas Ravelston had no right to any payment if International

terminated its management agreement with Ravelston.

8. It was further part of the scheme that, at the Audit Committee meeting on September 11, 2000, KIPNIS, in addition to not correcting the false statements and material omissions set forth in paragraph 7, made additional false statements in support of the non-competition fees and the break fee.

- KIPNIS stated that CanWest had originally insisted on BLACK and Radler each receiving $16.8 million (Cdn. $26 million) for their non-competition agreements; in fact, CanWest never insisted that any non compete covenantor receive any money.
- KIPNIS stated that BLACK and Radler had negotiated so that "Cdn $12 million be reallocated [from the money that CanWest had purportedly require BLACK and Radler to receive] to cover bonuses for senior management, which reallocation would save the Company additional bonus costs." In fact, there were no negotiations with CanWest about the allocation of the non-competition fees, and senior management received their bonuses from Ravelston, not International.
- KIPNIS stated that the break fee was justified because Ravelston had willingly reduced its management fees from International for the year 2000, which had the effect of increasing International's sale proceeds from CanWest. In fact, Ravelston did not reduce its management fee for the

> year 2000 and never contemplated doing so. Moreover, even it had, doing so would have had no impact on the amount of International's sales proceeds from CanWest because the amount of Ravelston's management fee from International in 2000 was irrelevant; the sale proceeds were affected only by the amount of Ravelston's management fee from CanWest from 2001 forward.

The Audit Committee approved the non-competition fees and break fee as presented. At a meeting of the board of directors on the same day, with ATKINSON, BOULTBEE and KIPNIS present, the board approved the payments after the chairman of the Audit Committee summarized the information that had been presented to the Audit Committee, including several of the false statements set forth above.

9. It was further part of the scheme that, on or about November 16, 2000, the CanWest transaction closed and Ravelston, BLACK, Radler, BOULTBEE and ATKINSON signed non-competition agreements and caused approximately $52.8 million (Cdn. $81.7 million) to be disbursed to themselves -- approximately $11.9 million (Cdn. $18.4 million) each to BLACK and Radler, approximately $1.3 million (Cdn. $2 million) each to BOULTBEE and ATKINSON, and approximately $26.4 million (Cdn. $40.9 million) to Ravelston. The extra million dollars (Cdn. $1.7 million) was interest to November 16, 2000 from July 30, 2000 -- the date of the transaction agreement -- which provided that CanWest would pay International interest from the date that the transaction agreement was signed. The exact

amounts were distributed pursuant to the terms of a memorandum that was sent by facsimile from International's Treasurer in New York City to the bank in Toronto. Although the Audit Committee had been told that International would receive $2.6 million (Cdn. $4 million) for its non-competition agreement, it in fact received nothing. Before ATKINSON and BOLTLTBEE were inserted as non-compete covenantors, the transaction documents negotiated by the parties stated that the non-competition agreements were a condition of closing imposed by CanWest, which was true as to the non-competition covenantors identified at that time. After the defendants inserted ATKINSON and BOULTBEE to the list of non-competition covenantors, this language was not changed, even though the language did not apply to ATKINSON and BOULTBEE. BLACK, BOULTBEE and ATKINSON knew that the transaction documents were false to the extent that they stated that CanWest had conditioned the closing on receipt of non-competition agreements from BOULTBEE and ATKINSON.

10. It was further part of the scheme that, at a meeting of the international board of directors on December 4, 2000, BLACK discussed the CanWest transaction and failed to disclose any of the false statements and material omissions set forth in paragraphs 5 through 9. In spite of their fiduciary duties to International, BOULTBEE, ATKINSON and KIPNIS, all of whom attended the meeting, also failed to disclose any of the false statements and material omissions relating to the payments.

11. It was further part of the scheme that, in the press release about the CanWest transaction,

BLACK, BOULTBEE, ATKINSON and KIPNIS failed to disclose the payments to Ravelston, BLACK, Radler, BOULTBEE and ATKINSON. The payments also were not disclosed in International's Form 10-K or its proxy statement, both of which were filed in early 2001. In or about April 2001, an attorney for a lender, who also represented International on other matters, discovered these payments in the course of doing due diligence in connection with a proposed loan to International. The lender attorney opined that International needed to disclose these payments in a filing with the SEC.

12. It was further part of the scheme that, following the additional scrutiny prompted by the lender attorney, BLACK, BOULTBEE, ATKINSON and KIPNIS decided to alter the paper record on which the CanWest payments were approved. The defendants sought ratification of the payments from the Audit Committee and the Board of Directors based on a memorandum, dated May 1, 2001 ("the May memorandum"). The stated purpose of the May memorandum, which was submitted to the Audit Committee and the entire Board, was to correct certain "inadvertent" inaccuracies in the information that had been provided to the Audit Committee and the Board in September 2000, and to set forth all relevant facts about those payments so that the independent directors might ratify the payments on a full and accurate record. In fact, the May memorandum, while it corrected some of the prior falsehoods, exacerbated the fraud on the independent directors, by adding new false and fraudulently misleading statements and by failing to correct many of the prior falsehoods. The May memorandum was signed by KIPNIS, but was reviewed by all

defendants. The May memorandum was false and misleading as follows:

- The May memorandum stated that the September 2000 representations about the break fee for Ravelston and bonuses for senior management were "inadvertent" deviations from the CanWest transaction documents, which only referred to money allocated for non-competition agreements. In fact, the break fee justification and the bonus references were not "inadvertent." Throughout the negotiation of the CanWest transaction, BLACK, ATKINSON and BOULTBEE had contemplated that part of the non-competition consideration would he paid to Ravelston as a break fee, and that the payments to ATKINSON and BOULTBEE were bonuses.

- The May memorandum stated that "CanWest's obligation to consummate the transaction was conditional on its receipt at the closing of non-competition agreements in a prescribed form by certain parties specified by it in the Transaction Agreement," including BOULTBEE and ATKINSON, and that "[t]o satisfy this critical closing condition," BOULTBEE and ATKINSON signed non-competition agreements. In fact, CanWest did not specify that BOULTBEE and ATKINSON sign non-competition agreements. Although the transaction documents contained pre-existing language stating the agreements were a condition of closing,

in fact, as defendants well knew, they had inserted BOULTBEE and ATKINSON as non-competition covenantors, and neither party had changed the pre-existing language to address that fact – CanWest because it did not care enough to do so, and the defendants because they wanted to create the false impression that the agreements signed by BOULTBEE and ATKINSON were closing conditions and that their non-competition agreements were genuine.

- The May memorandum stated that the "Non-Competition Consideration paid by CanWest to the individual Obligors [BLACK, Radler, BOULTBEE and ATKINSON] does not, and because it was paid by CanWest cannot, have the character of compensation to the recipients thereof contrary to a comment which so suggests in the September 11th Audit Committee meeting." In fact, the "Non-Competition Consideration" was not paid by CanWest to the individual Obligors. CanWest paid this money to International, which disbursed it to the defendants at their direction. Moreover, until BLACK, BOULTBEE and ATKINSON decided that $51.8 million (Cdn. $80 million) of the sale proceeds would be allocated to the "Non-Competition Consideration," all of the $51.8 million (Cdn. $80 million) was earmarked for International as sales proceeds for the newspapers that it was selling. Furthermore, as to ATKINSON and BOULTBEE, the payments were in

fact compensation in the form of bonuses from International. Thus, International "paid" the non-competition consideration in every sense of the word.

- The May memorandum stated that "the Non-Competition Consideration was established in the Transaction Agreement and reflected the value attributed by CanWest to the Obligors' non-competition agreements." In fact, the $51.8 million (Cdn. $80 million) that was set aside for the "Non-Competition Consideration" did not reflect the value attributed by CanWest to the non-competition agreements. That amount was chosen unilaterally by the defendants and inserted into the Transaction Agreement at their request. CanWest did not object to the defendants' proposal because the allocation of a portion of the purchase price to the non-competition agreements was irrelevant to CanWest - CanWest was paying the same total amount regardless.

- The May memorandum stated that "the amount of the Non-Competition Consideration relative to the sale price of the assets sold by the Corporation to CanWest, being approximately 2.5 %, is consistent with the amount of payments made for non-competition covenants in several recent asset sales by the Corporation." In fact, in recent asset sales, substantially more than 2.5 % of the sale price had been allocated to non-competition payments because BLACK,

Radler, BOULTBEE and ATKINSON had decided to insert themselves as non-competition covenantors and to pay themselves non-competition fees from proceeds that otherwise would have been paid to International. Thus, for example, in the CNHI II deal (which had closed in November 2000, the same month as the CanWest transaction), the amount paid for non-competition covenants was greater than 10 % of the sale price because BLACK, Radler, BOULTBEE and ATKINSON had decided to pay themselves $9.5 million in fraudulent non-competition fees. When the defendants went back to the Audit Committee in May 2001 for ratification of CanWest payments originally approved in September 2000, they had a fiduciary obligation to disclose to the Audit Committee that in November 2000, February 2001 and April 2001, they had fraudulently obtained approximately $15 million in non-competition fees in connection with the U.S. Community asset sales. By failing to do so, defendants breached their fiduciary duties to International and the public majority shareholders.

- The May memorandum failed to disclose: that the September memorandum had represented that International would receive $2.6 million (Cdn. $4 million) for its non-competition agreement, but in fact received nothing.

On May 1, 2001, KIPNIS sent the May memorandum by facsimile to the Chairman of International's Audit Committee in London, England. On May 4, 2001, KIPNIS and Radler spoke by telephone with the Chairman of the Audit Committee about the May memorandum and the purported "inaccuracies" in International's minutes relating to the CanWest transaction. On May 4, 2001, KIPNIS sent the May memorandum by overnight mail to the members of International's Audit Committee.

13. It was further part of the scheme that, at a meeting of International's Audit Committee on May 14, 2001, KIPNIS discussed the May memorandum. According to minutes of the meeting prepared by KIPNIS, he told that Audit Committee that: "In reviewing the minutes [relating to the September 2000 approval of the CanWest non-competition payments], we found that in a number of inadvertent respects, the minutes did not accurately reflect the CanWest transaction. All of the amounts originally considered by the Audit Committee and the Board were correct, both absolutely and relative to the size of the transaction." Both representations were false. The inaccuracies in the prior minutes were not inadvertent, and the amounts originally considered in September 2000 included $2.6 million (Cdn. $4 million) that was earmarked for International; but in the amounts ratified in May 2001, the $2.6 million (Cdn. $4 million) that was originally supposed to go to International instead went to Ravelston. Based on these oral misrepresentations and the misrepresentations in the May memorandum, the Audit Committee ratified the payment of the "Non-Competition Consideration"

in the Can West transaction to Ravelston, BLACK, Radler, BOULTREE and ATKINSON.

14. It was further part of the scheme, on May 14, 2001, KIPNIS prepared a memorandum for use by the Chairman of the Audit Committee when he made his report to the full Board about the Audit Committee's ratification of the CanWest payments. The memorandum was copied to ATKINSON. in the May 14, 2001 memorandum, KIPNIS repeated the falsehood that "[i]n a number of inadvertent respects, the material reviewed in connection with the September 11 Audit and Board meetings did not accurately reflect the CanWest transaction," as well as the false statement that "[a]ll of the amounts originally considered by the committee and board were correct – both absolutely and relative to the size of the transaction." At a meeting of the full Board of Directors of International on May 17, 2001, the Chairman of the Audit Committee, when discussing the proposed ratification of the CanWest payments, repeated the falsehoods that KIPNIS had provided to him. Based on these falsehoods, as well as the false statements in the May memorandum, the independent directors on the full Board ratified the CanWest non-competition payments. BLACK, BOULTBEE, ATKINSON and KIPNIS attended the Board meeting. Each knew that the May memorandum was false and fraudulent, and that the independent directors had been lied to about the money that supposedly was to be paid to International, but was not. None of them corrected any of the false information that was provided to the independent directors.

CanWest Disclosures to Shareholders

15. It was further part of the scheme that, on or about May 15, 2001, International filed a Form 10Q with the SEC. The 10Q discussed the non-competition fees in the CanWest transaction. BLACK, BOULTBEE and ATKINSON caused the 10Q to falsely state that the non-competition agreements signed by BOULTBEE and ATKINSON were "required by CanWest as a condition of the transaction." The 10Q also failed to disclose: (1) that BLACK, BOULTBEE and ATKINSON had fraudulently diverted the money that was used to pay the non-competition fees from International to themselves; and (2) that BLACK, BOULTBEE, ATKINSON and KIPNIS had twice obtained Audit Committee and Board approval of these payments by fraud. The defendants caused a similar false and fraudulent disclosure to be included in International's 2001 Form 10-K, which was filed with the SEC in March 2002.

16. It was further part of the scheme that, at International's annual shareholder meeting on May 23, 2002, BLACK made numerous false and fraudulent statements about the CanWest non-competition payments, as follows:

- In response to a question expressing concern about the level of non-competition payments by International to BLACK and others, BLACK responded: "The answer is that it was in our opinion not technically speaking a reduction of the compensation paid to this company. The consideration was not reduced there by the acquirer in the principle case that you're referring to, the CanWest deal." This was false. Until

BLACK, BOULTBEE and ATKINSON decided that $51.8 million (Cdn. 880 million) of the sale proceeds would be allocated to the "Non-Competition Consideration," all of that money was earmarked for International as compensation for the newspapers that it was selling.

- BLACK also stated:

> And Mr. Asper [CanWest's executive chairman] demanded that there be a non-compete arrangement and effectively the independent directors of this company determined that since he wished - that it was something that he was paying valuable consideration for and some of that should come to us and not this company. And that was not a matter negotiated directly by us. And, I suppose there's room for debate here, but in all circumstances, the independent directors did what they thought was best.

This statement was false and fraudulent because: (1) CanWest did not demand that BOULTBEE and ATKINSON sign non-competition agreements; (2) the non-competition payments were not negotiated by the independent directors; BLACK, BOULTBEE and ATKINSON determined the amounts of the payments and to whom they would be made; (3) CanWest did not consider itself to be "paying valuable consideration for" the non-competition agreements; CanWest was indifferent to

the amount allocated to the non-competition agreements, which was determined by BLACK, BOULTBEE and ATKINSON; (4) all, not "some," of the non-competition consideration was paid to BLACK, Radler, BOULTBEE, ATKINSON and Ravelston; none was retained by International; and (5) the approval of the independent directors was obtained by fraud.

17. It was further part of the scheme that defendants and their co-schemers used the United States mail, commercial interstate couriers and the interstate wires to execute the scheme. For example, KIPNIS sent transaction documents to others by interstate facsimile, e-mail and commercial interstate couriers. Money was wire transferred in interstate commerce. KIPNIS sent out packages of materials to the International Audit Committee by facsimile, e-mail and commercial interstate carriers. International wired its filings to the SEC in Washington, D.C.

18. It was further part of the scheme that defendants and their co-schemers did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, acts done in furtherance of the scheme and the purpose of those acts beyond those acts of concealment set forth above.

19. On or about May 1, 2001, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate and foreign commerce from Chicago, Illinois, to London, England, by means of wire and radio communications, certain writings, signs, and signals, namely: a facsimile of a letter and the May Memorandum;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT NINE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 18 of Count Eight of this Indictment as though fully set forth herein.

2. On or about May 4, 2001, at Chicago, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, for the purpose of executing and attempting to execute the above-described scheme, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, envelopes addressed to members of the International Audit Committee in New York and Washington, D.C., to be sent and delivered by an interstate carrier, namely, Federal Express, according to the directions thereon, which envelopes contained a memorandum relating to the non-competition payments in the CanWest transaction;

In violation of Title 18, United States Code, Sections 1341, 1346 and 2.

COUNT TEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraph 1 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. International leased a jet airplane that BLACK was authorized to use for company business. International also paid for entertainment expenses incurred by BLACK for the purpose of promoting International's business. In addition, International owned an apartment at 635 Park Avenue, Second Floor, New York, New York ("the Second Floor Apartment"), which BLACK was authorized to use when he was in New York City. A subsidiary purchased the Second Floor Apartment in December 1994 for $3 million. BLACK was given an option to purchase the Second Floor Apartment, including any capital improvements or furnishings of the apartment paid for by the company, at a price equal to the then aggregate fair market value thereof, payable in cash at the closing of the purchase. BLACK's use of this apartment and his option to purchase it were disclosed to International's Audit Committee.

b. The option agreement provided that International would pay for "all closing costs and all capital improvements, decorating and furnishings needed, as agreed between BLACK and the Company, to put the Apartment into appropriate habitable condition for the uses contemplated by

BLACK and the Company." In 1996, however, BLACK made plans to spend more than $2 million to, among other things: (1) reduce the number of bedrooms from six to three; and (2) decorate the apartment in lavish fashion. By this point, several significant shareholders had complained about the company spending $3 million on an apartment in New York City for use by an executive who was a Canadian citizen and, for tax reasons, could only spend a limited number of days each year in the United States. Because shareholders were complaining about the company's purchase of the apartment, BLACK and the company agreed that BLACK would pay for his proposed renovation of the apartment. This did not change the terms of the option agreement. There was never any discussion about International reimbursing BLACK for this expense, or that BLACK's payment thereof created any loan from BLACK to the company. The International employee with whom BLACK reached this agreement was an executive referred to herein as "Executive B," who was the person at International who was responsible for dealing with shareholder complaints. Executive B worked out of International's office in New York City.

c. In January 1998, BLACK purchased the Ground Floor Apartment at 635 Park Avenue, New York, New York ("the Ground Floor Apartment"), for approximately $499,000. In 1998 and 1999, while BLACK owned the apartment, International paid more than $1.5 million for a total renovation of the Ground Floor Apartment. Among other things, the Ground Floor Apartment was converted into three distinct living spaces. BLACK's servants, among others, thereafter stayed in the Ground Floor

Apartment. BLACK paid little, if anything, toward the renovation of the Ground Floor Apartment.

d. As a controlling shareholder, officer and director of International, BLACK had a fiduciary duty of undivided loyalty to International, which among other things, required BLACK to refrain from acting to benefit himself or anyone else at International's expense, to disclose all material facts to International's independent directors regarding any transactions involving himself and International, and to abide by the determination of such independent directors as to the fairness of the transaction.

General Scheme Allegations

3. Beginning no later than in or about May 1998 and continuing thereafter until at least in or about August 2002, at Chicago, in the Northern District of Illinois, Eastern Division and elsewhere,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, along with others known and unknown to the grand jury, devised, intended to devise, and participated in a scheme to defraud International and International's public shareholders of money, property and their intangible right of honest services, and to obtain money and property from these victims by means of materially false and fraudulent pretenses, representations, promises and omissions. This scheme is further described below.

4. It was part of the scheme that BLACK, with BOULTBEE's assistance, repeatedly abused the perquisites provided to BLACK by international for the purpose of benefitting BLACK at the expense of

the corporation and its public majority shareholders. BLACK exacerbated these breaches of fiduciary duty by determining himself what the corporation would pay to him, or on his behalf, and failing to present the related party transactions between himself and the company to International's Audit Committee. As a result, BLACK fraudulently obtained millions of dollars from International, and he and BOULTBEE fraudulently deprived international of its right to receive their honest services..

Bora Bora Vacation

5. It was further part of the scheme that, in the summer of 2001, BLACK fraudulently caused International to pay for his use of International's corporate jet to transport himself and his wife on a personal vacation to Bora Bora in French Polynesia. BLACK and his wife left Seattle for Bora Bora on July 30, 2001, and returned to Seattle on August 8, 2001, logging a total of 23.1 hours in flight. There was little, if any, business purpose to this vacation, which cost International tens of thousands of dollars.

6. It was further part of the scheme that BLACK failed to bring his use of International's corporate jet for his Bora Bora vacation to the attention of International's Audit Committee, thus breaching his fiduciary duty and depriving International of his honest services. Instead, BLACK took it upon himself to determine who should bear the cost of his personal use of International's corporate jet. When International's accountants sought to have him reimburse International for this cost, BLACK refused, stating in an August 2002 e-mail to ATKINSON that "[n]eedless to say, no such outcome is acceptable."

7. It was further part of the scheme that, to conceal his breach of fiduciary duty, BLACK failed to disclose International's underwriting of his Bora Bora vacation in International's 2002 proxy statement. The proxy statement purported to disclose all of the compensation that BLACK received from International in 2001, including International's payment of BLACK's personal expenses, but it contained no mention of Black's personal use of International's corporate jet. As chief executive officer, BLACK signed International's 2002 proxy statement, which was filed with the SEC on April 4, 2002, by wire from Chicago.

The Birthday Party

8. It was further part of the scheme that, in December 2000, BLACK fraudulently caused International to pay more than $40,000 for his wife's surprise birthday party. The party occurred on December 4, 2000, at La Grenouille restaurant in New York City. The party cost approximately $62,000; related expenses included 80 dinners at $195 per person, and $13,935 for wine and champagne. The party was a social occasion with little, if any, business purpose. Yet BLACK, without any disclosure or consultation with International's Audit Committee, determined. that International would pay approximately $42,000 for the party; and that he would pay only $20,000.

The New York City Apartments

9. It was further part of the scheme that BLACK and BOULTBEE defrauded International of millions of dollars, as well as its right to receive their honest services, in connection with International's renovation of the Ground Floor Apartment, and his

purchase from International of the Second Floor Apartment.

10. It was further part of the scheme that, starting in or about May 1998 and continuing until in or about September 1999, BLACK caused International to expend more than $1.5 million to renovate the Ground Floor Apartment, which at that time was owned by BLACK. Among other things, the Ground Floor Apartment was converted into three distinct living spaces. One of the purposes of this was to create living spaces for BLACK's servants, so that they would be proximate to the Second Floor Apartment. Indeed, one of the reasons that BLACK purchased the Ground Floor Apartment was so that his servants would have a place to live near the Second Floor Apartment. After the renovation was complete, BLACK's servants often resided in the Ground Floor Apartment when BLACK was in New York City. International's directors and employees, as well as others, also stayed in the Ground Floor Apartment.

11. It was further part of the scheme that BLACK concealed the fact that International had paid for the renovation of his Ground Floor Apartment by causing International to make false statements in its proxy statements about these payments. International's 1999 proxy statement described the Second Floor Apartment that International had purchased for BLACK's use in 1994, and then stated that International in 1998 had paid $957,722 for "building out and maintaining" that apartment. International's 2000 proxy statement again referred to the Second Floor Apartment, and stated that International in 1999 had paid $143,500 for "building out and maintaining"

that apartment. In fact, the "building out" expenses referred to in both proxy statements related to the Ground Floor Apartment; there was no significant construction done on the Second Floor Apartment in 1998 or 1999. BLACK signed both proxy statements on behalf of International.

12. It was further part of the scheme that, in or about December 2000, BLACK and BOULTBEE defrauded International of millions of dollars, as well as its right to receive their honest services, in connection with BLACK's purchase from International of the Second Floor Apartment.

13. It was further part of the scheme that, after BLACK fraudulently obtained millions of dollars in non-competition fees from the CNHI II and CanWest transactions in November 2000, BLACK decided to purchase the Second Floor Apartment, and that the price that he would pay would be the same that the company had paid for it six years earlier -- $3 million. In order to justify that price, BLACK and BOULTBEE falsely stated to Executive B that the option agreement allowed BLACK to purchase the apartment at International's "cost."

14. It was further part of the scheme that, a short while later, BOULTBEE telephoned Executive B and told him that BLACK would purchase the Second Floor Apartment for $3 million, suggested that this was the "market value" in light of BLACK's payment for the renovation, and directed Executive B to write a memorandum memorializing this transaction after calling Executive B's friends in real estate to confirm the $3 million amount. BOULTBEE did not explain why he had earlier stated that BLACK's option was at "cost," but he was now talking about "market value" as the basis for

BLACK's exercise of the option. BOULTBEE also did not explain how he and BLACK had reached the conclusion that International's beneficial interest in the Second Floor Apartment, which the company had purchased in 1994, had not appreciated at all in six years in the booming Upper East Side real estate market. Notwithstanding these facts, Executive B did as he was told because: (1) BLACK and BOULTBEE had told him that BLACK's option, notwithstanding the references to "fair market value," was at cost; (2) it was clear that BLACK did not intend to pay more than $3 million; and (3) Executive B very much wanted the proposed transaction to go forward because it would result in some money going back to the company and would defuse the shareholder complaints about the apartment, which had continued over the years.

15. It was further part of the scheme that, a short time later, BOULTBEE told Executive B that BLACK would pay the $3 million for the Second Floor Apartment by tendering to the company $2,150,000 in cash, along with BLACK's interest in the Ground Floor Apartment, which BOULTBEE said had a fair market value of $850,000. BOULTBEE did not explain this valuation, or the inconsistency between the lack of appreciation of International's interest in the Second Floor Apartment and the sizable appreciation attributed to BLACK's interest in the Ground Floor Apartment.

16. It was further part of the scheme that Executive B thereafter had brief, superficial conversations with some New York City real estate specialists and then wrote a memorandum to KIPNIS which stated:

> After in-depth discussions with various New York City real estate specialists and meetings with Jack Boultbee, it has been agreed that the fair market value of Apartment 2, at the above address, is US $3,000,000. The fair market of the Ground Floor apartment at the same address is US $850,000.

The memorandum was false in that: (1) Executive B's conversations with the real estate specialists in fact were brief and superficial; (2) the fair market value of International's interest in the Second Floor Apartment substantially exceeded $3 million; and (3) there was no basis for claim that the fair market value of BLACK's interest in the Ground Floor Apartment was $850,000, other than BOULTBEE's unsubstantiated representation to that effect. As directed, Executive B sent a copy of the memorandum to BOULTBEE. An attorney prepared a transfer agreement called an "Instrument of Transfer and Declaration of Trust," that was dated as of December 29, 2000.

17. it was further part of the scheme that, on or about January 23, 2001, BLACK and International, by Executive B, signed the "Instrument of Transfer and Declaration of Trust," pursuant to which BLACK acquired International's interest in the Second Floor Apartment for $3,000,000. In this document, BLACK and Executive B "agreed" that "the fair market value" of International's "beneficial interest" in the Second Floor Apartment was $3,000,000. The document provided that BLACK would pay this amount by tendering $2,150,000 in cash to International, and by transferring to International the beneficial interest in the Ground Floor

Apartment, which BLACK and Executive B "agreed" had a "fair market value" of $850,000.

18. It was further part of the scheme that the "agreed" fair market value for the Second Floor Apartment was a sham. In addition to the substantial increase in property values between 1994 and 2000, International had spent during that time period more than $400,000 on capital improvements for the Second Floor Apartment. Regardless of how much of his own money BLACK spent on the Second Floor Apartment, International's beneficial interest in the apartment was worth substantially more than $3,000,000 in December 2000.

19. It was further part of the scheme that BLACK'S payment to International for the Second Floor Apartment also involved fraud. The $2,150,000 that BLACK paid in cash was funded by his non-competition fees from the CNHI II and CanWest transactions, which BLACK had obtained in November 2000 by fraud, as set forth in Counts One through Nine. BLACK wire transferred the $2,150,000 to International on or about December 22, 2000. In addition, the 70% increase in the fair market value ascribed to BLACK's beneficial interest in the Ground Floor Apartment (where international had paid more than $1.5 million for improvements) was inconsistent with the 0% increase ascribed to International's beneficial interest in the Second Floor Apartment (where BLACK had spent substantial sums on renovation).

20. It was further part of the scheme that BLACK breached his fiduciary duty by not bringing the December 2000 transaction before the International Audit Committee for its approval. The option agreement required that BLACK pay the

company "fair market value" and cash consideration for Second Floor Apartment. BLACK did neither – he paid International only its initial cost, and his purchase payment included the transfer to International of the Ground Floor Apartment. Moreover, both apartments had been substantially renovated since they had been purchased, with International paying for the renovations to the Ground Floor Apartment that had been owned by BLACK, and BLACK paying for improvements to the Second Floor Apartment that had been owned by the company. Under these circumstances, in order for BLACK to purchase the Second Floor Apartment in December 2000 under the terms proposed, BLACK's fiduciary duties required that lie disclose all material facts regarding his proposed purchase to International's independent directors, and to abide by their determination as to the fairness of the transaction. BLACK failed to do so; the material facts regarding his December 2000 purchase of the Second Floor Apartment were not presented to the independent directors of International. By so acting, BLACK breached his fiduciary duties to International and its public, majority shareholders, and fraudulently deprived them of his honest services.

21. It was further part of the scheme that BLACK concealed his fraud in connection with the December 2000 transaction by causing International to omit material facts regarding the transaction in its 2001 proxy statement. The proxy statement was submitted to the SEC by wire from Chicago to Washington, D.C., on or about March 27, 2001. With respect to BLACK's option to purchase the Second Floor Apartment, the proxy statement stated that International previously had granted to BLACK an

option to acquire at any time International's interest in the Second Floor Apartment, at its "then fair market value[]. . . . Effective December 29, 2000, Mr. Black exercised his option to purchase." The proxy statement was fraudulent in that it failed to disclose that BLACK had not paid "fair market value" for the Second Floor Apartment, that he had not paid cash consideration as required by the option agreement, and that he had not obtained the required, fully informed approval of this transaction from the independent directors of International. This same fraudulent statement was repeated in International's 2002 proxy statement, which was filed with the SEC on or about April 4, 2002. BLACK signed the proxy statements on behalf of international, and BOULTBEE reviewed them before they were filed with the SEC.

22. It was further part of the scheme that, after International acquired the Ground Floor Apartment in December 2000, BLACK caused his servants to stay there, rent-free, on multiple occasions. As with his other breaches of fiduciary duty regarding the apartments, this abuse was not disclosed to the International Audit Committee or in International's proxy statements.

23. It was further part of the scheme that defendants and their co-schemers did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, acts done in furtherance of the scheme and the purpose of those acts beyond those acts of concealment set forth above.

24. On or about March 27, 2001, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Washington, D.C., by means of wire and radio communications, certain writings, signs, and signals, namely: International's proxy statement for 2001, which was filed by wire with the SEC;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT ELEVEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 23 of Count Ten of this Indictment as though fully set forth herein.

2. On or about April 4, 2002, at Chicago in the Northern District of Illinois, Eastern Di vision,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, for the purpose executing the above-described scheme, did knowingly cause to he transmitted in interstate commerce from Chicago, Illinois, to Washington, D.C., by means of wire and radio communications, certain writings, signs, and signals, namely: International's proxy statement for 2002, which was filed by wire with the SEC;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT TWELVE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs I through 23 of Count Ten of this Indictment as though fully set forth herein.

2. On or about December 22, 2000, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, for the purpose of executing the above-described scheme, did knowingly cause to be transmitted in interstate commerce from Toronto, Canada, to Chicago, Illinois, by means of wire and radio communications, certain writings, signs, and signals, namely: a wire transfer of $2,150,000 from an account controlled by BLACK at Canadian Imperial Bank of Commerce ("CIBC") in Toronto to International's account at Bank One in Chicago, which was part of BLACK'S payment for the Second Floor Apartment;

In violation of Title 18, United States Code, Sections 1343, 1346 and 2.

COUNT THIRTEEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 and 2 of Count Five and paragraphs 1 through 18 of Count Eight of this Indictment as though fully set forth herein.

2. On or about December 22, 2000, at Chicago in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,

defendant herein, knowingly engaged and attempted to engage in a monetary transaction affecting interstate and foreign commerce, in criminally derived property of a value greater than $10,000, that is, the wire transfer of $2,150,000 from an account controlled by BLACK at CIBC in Toronto to International's account at Bank One in Chicago, such property having been derived from a specified unlawful activity, namely the use of an interstate carrier for the purpose of executing and attempting to execute a scheme to defraud and to obtain money and property in connection with the CNHI II transaction in violation of Title 18, United States Code, Section 1341, and the use of a wire transmission in interstate and foreign commerce for the purpose of executing a scheme to defraud and to obtain money and property in connection with the CanWest transaction in violation of Title 18, United States Code, Section 1343;

In violation of Title 18, United States Code, Section 1957.

COUNT FOURTEEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraph 1 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. Inc. and Ravelston were Canadian corporations with their principal offices located at 10 Toronto Street, in Toronto, Canada ("the 10 Toronto Street offices"). BLACK, as Chief Executive Officer and Chairman of the Board of Directors of Inc. and

Ravelston maintained his principal office at the 10 Toronto Street offices.

b. On or about November 18, 2003, the Staff of the Division of Enforcement o the United States Securities and Exchange Commission (the "SEC") advised counsel for BLACK in writing that the SEC was conducting an investigation regarding International. Additionally, on or about November 18, 2003, the SEC served counsel for BLACK with the first of several subpoenas for documents requesting:

> "Any and all documents relating to the payment of fees, including management and. noncompete fees, from Hollinger to or for the benefit of any personnel of Hollinger or its affiliates, including, but not limited to, Conrad Black, David Radler, Mark Kipnis, Peter Atkinson, Jack Boultbee and to or for the benefit of any entities, including, but not limited to, Ravelston Corp., Horizon Publications, Inc. and Bradford."

c. On or about August 27, 2004, the SEC notified BLACK in writing that it intended to recommend a civil injunctive action against BLACK for violations of Sections 10(b) and 13(h)(5) of the Securities Exchange Act of 1934, Rules 10b-5 and 13b2-1 thereunder, and, as a control person of the Company, Sections 13(a) and 13(b) of the 1934 Act and Rules 12b-20, 13a-1 and 13a-13 thereunder, relating to, among other things, "the transfer of Hollinger International, Inc. assets including, but not limited to, purported non-competition payments arid sales of newspapers."

d. On or about October 13, 2004, pursuant to an application made by Catalyst Fund General Partner

I Inc. ("Catalyst"), an Inspector was appointed for Inc. by the Superior Court of- Justice in Ontario, Canada (the "Canadian court"), pursuant to the provisions of section 229 of the Canadian Business Corporations Act, R.S.C. 1985 c. C-44 (the "CBCA") to investigate the affairs of Inc. The Inspector was directed by the Canadian court to investigate several areas, including but not limited to, related party transactions between Inc. and related parties, and non-compete payments received by Inc. and Inc.'s Senior Management, including BLACK, Radler, Boultbee and Atkinson.

e. On or about December 17, 2004, the Canadian court ordered that:

> No documents of Inc. wherever situated or documents of Related Parties [including BLACK, Radler, Boultbee and Atkinson] which are pertinent to Inc. shall be destroyed without further Order of this Court. No documents currently resident at 10 Toronto Street shall be removed, altered or destroyed without the consent in writing of the Inspector or further Order of this Court.

f. On or about November 15, 2004, the SEC filed a Complaint for Permanent Injunction and. Other Equitable Relief against CONRAD BLACK and others (the "SEC proceeding"). The SEC's Complaint alleged that BLACK engaged in a fraudulent and deceptive scheme to divert money from International "through a series of related-party transactions involving, among other things, purported 'non-compete payments. . .." An amended complaint was filed on March 10, 2005.

g. On or about March 21, 2005, the United States Attorney's Office for the Northern District of

Illinois (the "government") filed a motion to intervene, for a limited, temporary stay of discovery in the SEC proceeding. In the motion, which was served on BLACK's counsel, the government declared:

> The United States Attorney's Office for the Northern District of Illinois [] is conducting a criminal investigation of Black, Radler, Hollinger, Inc. (collectively, 'the SEC defendants') and others relating to their conduct as to Hollinger International. The criminal investigation seeks to determine whether the SEC defendants and others fraudulently diverted corporate assets and opportunities owned by Hollinger International to themselves and to companies that they controlled. The transactions under investigation include various purported 'non-competition payments' that were made to Black, Radler, Hollinger, Inc. and others in connection with Hollinger international's sale of newspaper publications to third parties. The criminal investigation also seeks to determine whether fraud occurred in connection with Hollinger International's sale of newspaper publications to companies controlled by Black and Radler, as well as other transactions between Hollinger International and the SEC defendants and their companies. In connection with each of these related party transactions, the criminal investigation seeks to determine whether the transaction was appropriately disclosed to Hollinger International's independent directors, in Hollinger International's SEC filings, and

during Hollinger International's shareholder meetings.

The government further advised:

> The government's criminal investigation seeks to determine whether the SEC defendants and others have violated various federal criminal statutes, including, but not limited to, Title 18, United States Code, Section 371 (conspiracy), 1341 (mail fraud), 1343 (wire fraud) and 2314 (interstate transportation of funds obtained by fraud), and Title 15, United States Code, Sections 77c(a), 77e(c), 77q(a), and 78j(b), and Title 17, Code of Federal Regulations, Section 240.10b-5 (securities fraud).

h. On or about April 20, 2005, the government's motion to intervene in the SEC Proceeding was granted.

i. As part of the SEC proceeding, on or about March 29, 2005, the SEC served its "First Request for Production of Documents" to Inc. The SEC requested, among other things, "All documents relating to any matters that are the subject to the allegations contained in the [SEC's] Complaint." The SEC's March 29, 2005 document request was served on counsel for BLACK, and others.

j. On or about May 19, 2005, Senior Trial Counsel for the SEC advised counsel for BLACK via telephone that the SEC would be serving a request for production of documents to BLACK shortly. The May 19, 2005 telephone call with BLACK'S counsel was followed by a letter sent later that day, via facsimile and Federal Express, to BLACK's counsel

confirming that the SEC would be serving a request for production of documents to BLACK shortly.

k. As part of the SEC proceeding, on or about May 20, 2005, the SEC served its "First Request for Production of Documents" to BLACK. The SEC requested, among other things, "All documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint." The SEC's May 20, 2005 document request was served on counsel for BLACK, and others.

l. On or about May 20, 2005, at approximately 2:08 p.m. E.S.T., an assistant to BLACK requested that security personnel at the 10 Toronto Street offices assist her in removing approximately 13 boxes to her vehicle in the rear parking area of the 10 Toronto Street offices. As the boxes were being moved by security personnel, a representative of Inc. advised the Inspector that BLACK was planning to remove boxes of documents from the 10 Toronto Street offices. Upon learning of BLACK's attempt to remove documents from the 10 Toronto Street offices, security personnel were advised by the Inspector of the December 17, 2004 Canadian court order regarding the removal of documents. Subsequently, all of the boxes were returned by security personnel to the inside of the 10 Toronto Street offices.

m. On or about May 20, 2005, at approximately 5:11 p.m. E.S.T., BLACK, his chauffeur and his assistant returned to the 10 Toronto Street offices and loaded the approximately 13 boxes of documents (which BLACK had attempted to have removed earlier in the day) from inside the 10 Toronto Street offices through a rear entrance and into BLACK's vehicle. BLACK'S vehicle was then driven away by his chauffeur with the boxes of documents inside.

3. On or about May 20, 2005, at Chicago, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,

defendant herein, corruptly concealed, and attempted to conceal, records, documents, and other objects with the intent to impair their availability for use in official proceedings, namely the SEC proceeding against BLACK, the criminal investigation of BLACK by a Federal grand jury and the pending criminal proceeding against BLACK before a judge and court of the United States;

In violation of Title 18, United States Code, Sections 1512(c)(1) and 2.

COUNT FIFTEEN

The UNITED STATES ATTORNEY further charges:

The Enterprise

1. Defendant CONRAD M. BLACK, F. David Radler, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis, Inc. and Ravelston constituted an association-in-fact enterprise (the "Hollinger Enterprise") within the meaning of Title 18, United States Code, Section 1961(4). The Hollinger Enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. The Hollinger Enterprise was engaged in, and its activities affected, interstate and foreign commerce.

2. Defendant CONRAD M. BLACK, as the controlling shareholder, Chief Executive Officer, and Chairman .of the Board of Directors of International, Inc. and Ravelston, was the principal leader,

manager and organizer of the Hollinger Enterprise. F. David Radler, who was the chief manager of International's United States newspapers, was involved in business decisionmaking relating to the purchases and sales of those newspapers. John A. Boultbee, who was a Chartered Accountant in Canada, functioned as BLACK's chief financial advisor, and was the architect of the Hollinger Enterprise's tax frauds. Peter Y. Atkinson, who was a licensed attorney in Canada, functioned as BLACK's chief legal advisor. Mark S. Kipnis, who was a licensed attorney in Illinois and was the secretary for the Board of Directors and Audit Committee of International, implemented the directives of BLACK and his associates.

Purposes of the Enterprise

3. The purposes of the Hollinger Enterprise included the following:

a. Enriching BLACK, his associates, and their entities at the expense of International and its public, majority shareholders through, among other things, mail fraud, wire fraud, and interstate transportation of money taken by fraud.

b. Depriving International and its public, majority shareholders of their right to receive honest services through, among other things, mail fraud and wire fraud.

c. Promoting and maintaining BLACK's control over the Hollinger Enterprise's affairs.

d. Enriching BLACK, his associates and their entities at the potential expense of the tax authorities of Canada through, among other things, mail and wire fraud.

e. Concealing the fraudulent activities of, and the fraud proceeds received by, BLACK, his associates and their entities.

Means and Methods

4. The means and methods by which BLACK and his associates conducted and participated in the conduct of the affairs of the Hollinger Enterprise included the following:

a. BLACK and his associates fraudulently deprived International of money and honest services by inserting themselves and their entities as non-competition covenantors and recipients of non-competition fee, without disclosing their misconduct to International's Audit Committee.

b. BLACK and his associates fraudulently deprived International of money and honest services by inserting themselves and their entities as non-competition covenantors and recipients of non-competition fees, and making false statements and material omissions about the payments to International's Audit Committee.

c. BLACK and his associates fraudulently labeled bonuses paid by International as non-competition fees in order to gain favorable tax treatment in Canada.

d. BLACK, with the assistance of Boultbee and other associates, fraudulently abused the perquisites that International had provided to BLACK - to the benefit of BLACK and the detriment of International - and failed to disclose BLACK's misconduct to International's Audit Committee, thereby depriving International of money and honest services.

e. BLACK and his associates concealed their fraudulent conduct by, among other things, causing International to make filings with the SEC that contained material falsehoods and omissions, by making false and fraudulent statements to International's shareholders and other outsiders.

f. The United States Attorney realleges and incorporates by reference the following paragraphs of this Indictment as though fully set forth herein: (a) paragraphs 1-33 of Count One; (b) paragraphs 1-18 of Count Eight; and (c) paragraphs 1-23 of Count Ten.

The Racketeering Violation

5. From in or about 1998 and continuing through in or about August 2002, at Chicago in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK,

defendant herein, together with F. David Radler, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis, Inc., Ravelston and others known and unknown to the grand jury, being persons employed by and associated with the Hollinger Enterprise, an enterprise engaged in, and the activities of which affected, interstate and foreign commerce, did conduct and participate, directly and indirectly, in the conduct of the affairs of Hollinger Enterprise through a pattern of racketeering activity set forth below.

The Pattern of Racketeering Activity

6. The pattern of racketeering activity, as defined in Title 18, United States Code, Section 1961(1) and 1961(5), consisted of the following acts:

Racketeering Act One: Interstate Transportation of Money Taken By Fraud

U.S. Community Sales – CNHI 1

7. Defendant BLACK committed Racketeering Act One as follows: On or about February 1, 1999, in the State of New York, and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $12,000,000 relating to the CNHI 1 non-competition agreement that was transferred from CNHI to a bank in New York, New York for credit to Inc.'s bank account in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

Racketeering Act Two: Interstate Transportation of Money Taken By Fraud

U.S. Community Sales – Horizon

8. Defendant BLACK committed Racketeering Act Two as follows: On or about August 9, 1999, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $1,200,000 relating to the Horizon non-competition agreement that was transferred from Horizon in Chicago, Illinois to Inc. in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

Racketeering Act Three: Interstate Transportation of Money Taken By Fraud/Mail Fraud

U.S. Community Sales – Forum and Paxton

9. Defendant BLACK committed the following acts, any one of which constitutes Racketeering Act Three:

a. On or about September 30, 2000, in the State of New York and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $ 100,000 relating to the Forum non-competition agreement that was transferred from Forum to a bank in New York, New York for credit to Inc.'s bank account in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

b. On or about October 2, 2000, in the State of New York and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce Money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $500,000 relating to the Paxton non-competition agreement that was transferred from Paxton to a bank in New York, New York for credit to Inc.'s bank account in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

c. On or about April 9, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to Kipnis, to be sent and delivered by an interstate carrier, according to the

directions thereon, which envelope contained "non-competition payments" in the form of checks totaling $600,000, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Racketeering Act Four: Interstate Transportation of Money Taken By Fraud/Mail Fraud

U.S. Community Sales – CM-I1 II

10. Defendant BLACK committed the following acts, any one of which alone constitutes Racketeering Act Four:

a. On or about November 1, 2000, in the State of New York and elsewhere, defendant BLACK caused to be transported, transmitted and transferred in interstate and foreign commerce money of the value of $5,000 or more, knowing the same to have been taken by fraud; namely $750,000 relating to the CNHI II non-competition agreement that was transferred from CNHI to a bank in New York, New York for credit to Inc.'s bank account in Toronto, Canada, in violation of Title 18, United States Code, Sections 2314 and 2.

b. On or about November 21, 2000, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to Mark S. Kipnis, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained a "non-competition" payment in the form of a check made payable to Radler in the amount of $4,300,000, in

violation of Title 18, United States Code, Sections 1341, 1346 and 2.

c. On or about November 21, 2000, in the State of Illinois, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to Peter Y. Atkinson, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained "non-competition" payments in the form of a check made payable to BLACK in the amount of $4,300,000, Boultbee in the amount of $450,000, and Atkinson in the amount of $450,000, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Racketeering Act Five: Mail Fraud

U.S. Community Sales – American Publishing Company

11. Defendant BLACK committed the following acts, any one of which alone constitutes Racketeering Act Five:

a. On or about February 8, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, an envelope addressed to Atkinson in Toronto, Canada, to be sent and delivered by an interstate carrier, namely, Federal Express, according to the directions thereon, which envelope

contained Noncompetition Agreements with American Publishing Company to be executed by certain International officers, and approximately $2.9 million in checks as consideration for those agreements, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

b. On or about March 1, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 33 of Count One of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to Kipnis, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained Non-Competition Agreements with American Publishing Company executed by certain International officers, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Racketeering Act Six: Wire Fraud/Mail Fraud

Canadian Sales – CanWest

12. Defendant BLACK committed the following acts, any one of which alone constitutes Racketeering Act Six:

a. On or about November 16, 2000, in the State of New York and elsewhere, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 18 of Count Eight of this indictment, did knowingly cause to be transmitted in interstate and foreign commerce from New York, New York, to Toronto, Canada, by means of wire and radio communications, certain writings, signs, and signals, namely: a facsimile of a memorandum

regarding the distribution of the CanWest non-competition consideration, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

b. On or about May 1, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 18 of Count Eight of this indictment, did knowingly cause to be transmitted in interstate and foreign commerce from Chicago, Illinois, to London, England, by means of wire and radio communications, certain writings, signs, and signals, namely: a facsimile of a letter and the May memorandum, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

c. On or about May 4, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, defendant BLACK, for the purpose of executing and attempting to execute the scheme described in paragraphs 1 through 18 of Count Eight of this indictment, did knowingly cause to be deposited for delivery by an interstate carrier from Chicago, Illinois, envelopes addressed to members of the International Audit Committee in New York and Washington, D.C., to be sent and delivered by an interstate carrier, namely, Federal Express, according to the directions thereon, which envelopes contained a memorandum relating to the non-competition payments in the CanWest transaction, in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Racketeering Act Seven: Wire Fraud

Perquisites

13. Defendant BLACK committed the following acts, any one of which alone constitutes Racketeering Act Seven:

a. On or about December 22, 2000, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 23 of Count Ten of this indictment, did knowingly cause to be transmitted in interstate and foreign commerce from Toronto, Canada, to Chicago, Illinois, by means of wire and radio communications, certain writings, signs, and signals, namely: a wire transfer of $2,150,000 from an account controlled by BLACK at CIBC in Toronto to International's account at Bank One in Chicago, in connection with BLACK's purchase of the Second Floor Apartment, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

b. On or about March 27, 2001, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 23 of Count Ten of this indictment, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Washington, D.C., by means of wire and radio communications, certain writings, signs, and signals, namely: International's proxy statement for 2001, which was filed by wire with the SEC, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

c. On or about April 4, 2002, at Chicago, in the Northern District of Illinois, Eastern Division, and

elsewhere, defendant BLACK, for the purpose of executing the scheme described in paragraphs 1 through 23 of Count Ten of this indictment, did knowingly cause to be transmitted in interstate commerce from Chicago, Illinois, to Washington, D.C., by means of wire and radio communications, certain writings, signs, and signals, namely: International's proxy statement for 2002, which was filed by wire with the SEC, in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

All in violation of Title 18, United States Code, Section 1962(c).

COUNT SIXTEEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. International was required to pay federal corporate income taxes in the United States.

b. International retained a tax preparer to prepare federal corporate tax returns (Form 1120), to report receipts, expenses and total income for International.

c. Defendants, as executives of International and agents of Ravelston, were responsible for maintaining accurate books and records.

d. Throughout 1999, defendants received various sums of cash from transactions, in the aggregate amount of approximately $13 Million, and,

caused those amounts to be deposited into accounts other than accounts controlled by International. Defendants' actions caused International to not correctly report the noncompete payments in 1999.

e. Defendants caused the tax preparer to prepare a false income tax return that failed to include the diverted cash receipts.

2. On or about September 15, 2000, in the Northern District Of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE
PETER Y. ATKINSON, and
MARK S. KIPNIS

defendants herein, willfully procured and assisted in the preparation of a false and fraudulent United States Corporation Income Tax Return (Form 1120) and accompanying Schedules, on behalf of International, for the calendar year 1999.

3. Defendants did not believe that the 1999 federal corporate income tax return was true and correct as to every material matter, in that it was stated in that return, line 11, that the total income of International was approximately $394 Million when, in fact, as defendants well knew, total income materially exceeded that amount and included gross receipts of approximately $13 Million, which was not reported on the corporate return;

In violation of Title 26, United States Code, Section 7206(2).

COUNT SEVENTEEN

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference paragraphs 1 through 33 of Count One of this Indictment as though fully set forth herein.

2. At times material herein:

a. international was required to pay federal corporate income taxes in the United States.

b. International retained a tax preparer to prepare federal corporate tax returns (Form 1120), to report receipts, expenses and total income for International,

c. Defendants, as executives of International and agents of Ravelston, were responsible for maintaining accurate books and records.

d. Throughout 2000 defendants received various sums of cash from transactions, in the aggregate amount of approximately $16 Million, and, caused those to be deposited into accounts other than accounts controlled by International. Defendants' actions caused International to not correctly report the noncompete payments in 2000.

e. Defendants caused the tax preparer to prepare a false income tax return that failed to include the diverted cash receipts.

2. On or about October 26, 2001, in the Northern District of Illinois, Eastern Division,

CONRAD M. BLACK,
JOHN A. BOULTBEE
PETER Y. ATKINSON, and
MARK S. KIPNIS

defendants herein, willfully procured and assisted in the preparation of a false and fraudulent United

States Corporation Income Tax Return (Form 1120) and accompanying Schedules, on behalf of International, for the calendar year 1999.

3. Defendants did not believe that the 2000 federal corporate income tax return was true and correct as to every material matter, in that it was stated in that return, line 11, that the total income of international was approximately $383 Million when, in fact, as defendants well knew, total income materially exceeded that amount and included gross receipts of at least $16 Million, which was not reported on the corporate return;

In violation of Title 26, United States Code, Section 7206(2).

FORFEITURE ALLEGATION ONE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference Counts One through Seven of this Indictment as though fully set forth herein. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2, that the United States will seek forfeiture as part of any sentence imposed in connection with a conviction on Counts One through Seven.

2. Beginning no later than in or about January 1999, and continuing thereafter until in or about May 2001, in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK,
JOHN A. BOULTBEE,
PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, did engage in violations of Title 18, United States Code, Sections 1341 and 1343, thereby subjecting to forfeiture to the United States, pursuant to Title 28, United States Code, Section 2461(c), and Title 18, United States Code, Section 981(a)(1)(C), all property constituting, or derived from, proceeds the defendants obtained directly or indirectly, as the result of such violations, namely $32,000,000, including but not limited to:

a. $8,558,035, which represents the net proceeds from BLACK's sale of the Second Floor Apartment that was seized by the United States in October 2005;

b. BLACK's residence at 1930 S. Ocean Boulevard in Palm Beach, Florida, both of which are pledged to secure BLACK's bond in this case;

c. $2,620,746.69 that represents BLACK's purchase of a 26 carat diamond ring from Graff Diamonds Limited purchased on or about November 21, 2000; and

d. $604,435 that represents BLACK's purchase of an antique pearl and diamond bow brooch from S.J. Phillips Ltd. on or about November 21, 2000.

3. Pursuant to Title 28, United States Code, Section 2461(c), and Title 21, United States Code, Section 853(p), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants, either:

- cannot be located upon the exercise of due diligence;

- has been transferred or sold to, or deposited with, a third party;
- has been placed beyond the jurisdiction of the Court;
- has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek forfeiture of any other property belonging to the defendants up to the value of the above forfeitable property, including but not limited to the following:

a. ATKINSON's residence at 3101 Redwood Road, Napa, California, which is pledged to secure ATKINSON's bond in this case.

FORFEITURE ALLEGATION TWO

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference Counts Eight and Nine of this Indictment as though fully set forth herein. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2, that the United States will seek forfeiture as part of any sentence imposed in connection with a conviction on Counts Eight and Nine.

2. Beginning no later than in or about May 2000, and continuing thereafter until in or about May 2002, in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK,
JOHN A. BOULTBEE,

PETER Y. ATKINSON and
MARK S. KIPNIS,

defendants herein, did engage in violations of Title 18, United States Code, Sections 1341 and 1343, thereby subjecting to forfeiture to the United States, pursuant to Title 28, United States Code, Section 2461(c), and Title 18, United States Code, Section 981(a)(1)(C), all property constituting, or derived from, proceeds the defendants obtained directly or indirectly, as the result of such violations, namely $52,800,000, including but not limited to:

a. $8,558,035, which represents the net proceeds from BLACK's sale of the Second Floor Apartment that was seized by the United States in October 2005;

b. BLACK's residence at 1930 S. Ocean Boulevard in Palm Beach, Florida, both of which are pledged to secure BLACK's bond in this case;

c. $2,620,746.69 that represents BLACK's purchase of a 26 carat diamond ring from Graff Diamonds Limited purchased on or about November 21, 2000; and

d. $604,435 that represents BLACK's purchase of an antique pearl and diamond bow brooch from S.J.Phillips Ltd. on or about November 21, 2000.

3. Pursuant to Title 28, United States Code, Section 2461(c), and Title 21, United States Code, Section 853(p), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants, either:

- cannot be located upon the exercise of due diligence;
- has been transferred or sold to, or deposited with, a third party;
- has been placed beyond the jurisdiction of the Court;
- has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek forfeiture of any other property belonging to the defendants .up to the value of the above forfeitable property, including but not limited to the following:

a. ATKINSON's residence at 3101 Redwood Road, Napa, California, which is pledged to secure ATKINSON's bond in this case.

FORFEITURE ALLEGATION THREE

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference Counts Ten through Twelve of this Indictment as though fully set forth herein. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2, that the United States will seek forfeiture as part of any sentence imposed in connection with a conviction on Counts Ten through Twelve.

2. Beginning no later than in or about May 1998, and continuing thereafter until in or about August 2002, in the Northern District of Illinois, Eastern Division, and elsewhere,

CONRAD M. BLACK and
JOHN A. BOULTBEE,

defendants herein, did engage in violations of Title 18, United States Code, Section 1343, thereby subjecting to forfeiture to the United States, pursuant to Title 28, United States Code, Section 2461(c), and Title 18, United States Code, Section 981(a)(1)(C), all property constituting, or derived from, proceeds the defendants obtained directly or indirectly, as the result of such violations, including bat not limited to:

a. At least $8,558,035, which represents the net proceeds from BLACK's sale of the Second Floor Apartment that was seized by the United States in October 2005, which is pledged to secure BLACK's bond in this case;

b. $2,620,746.69 that represents BLACK's purchase of a 26 carat diamond ring from GraffDiamonds Limited purchased on or about November 21, 2000; and

c. $604,435 that represents BLACK's purchase of an antique pearl and diamond bow brooch from S.J. Phillips Ltd. on or about November 21, 2000.

3. Pursuant to Title 28, United States Code, Section 2461(c), and Title 21, United States Code, Section 853(p), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants, either:

- cannot be located upon the exercise of due diligence;
- has been transferred or sold to, or deposited with, a third party;

- has been placed beyond the jurisdiction of the Court;
- has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek forfeiture of any other property belonging to the defendants up to the value of the above forfeitable property.

FORFEITURE ALLEGATION FOUR

The UNITED STATES ATTORNEY further charges:

1. The United States Attorney realleges and incorporates by reference Count Fifteen of this Indictment as though fully set forth herein. Notice is hereby given, pursuant to Federal Rule of Criminal Procedure 32.2, that the United States will seek forfeiture as part of any sentence imposed in connection with a conviction on Count Fifteen.

2. Beginning no later than in or about May 1998, and continuing thereafter until in or about August 2002, in the Northern District of Illinois, Eastern Division, and elsewhere, CONRAD M. BLACK, defendant herein, did engage in a violation of Title 18, United States Code, Section 1962, thereby subjecting to forfeiture to the United States certain property pursuant to Title 18, United States Code, Section 1963.

3. Defendant BLACK:

a. has acquired and maintained interests in violation of Title 18, United States Code, Section 1962, which interests are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1);

b. has interests in, securities of, claims against, and property and contractual rights which afford a source of influence over, the enterprise named and described herein which the defendant established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962, which interests, securities, claims, and rights are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963 (a)(2);

c. has property constituting and derived from proceeds obtained, directly and indirectly, from racketeering activity, in violation of Title 18, United States Code, Section 1962, which property is subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(3).

4. The interests of defendant BLACK subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(2)are:

a. All of his right, title and interest in stock and all other ownership interests in Conrad Black Capital Corporation, Ravelston and Inc.

5. The interests of defendant BLACK subject to forfeiture to the United States pursuant to Title 18, United States Code, Sections 1963(a)(1) and 1963(a)(3) are:

a. at least $92,000,000, including but not limited to:

1. the $8,558,035 that represents the net proceeds from BLACK'S sale of the Second Floor Apartment that was seized by the United States in October 2005, and. BLACK's residence at 1930 S. Ocean Boulevard in Palm Beach, Florida, both of

which are pledged to secure BLACK's bond in this case;

2. $2,620,746.69 that represents BLACK's purchase of a 26 carat diamond ring from Graff Diamonds Limited purchased on or about November 21, 2000; and

3. $604,435 that represents BLACK's purchase of an antique pearl and diamond bow brooch from S.J. Phillips Ltd. on or about November 21, 2000.

6. Pursuant to Title 18, United States Code, Section 1963(m), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant, either:

- cannot be located upon the exercise of due diligence;
- has been transferred or sold to, or deposited with, a third party;
- has been placed beyond the jurisdiction of the Court;
- has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek forfeiture of any other property belonging to the defendant up to the value of the above forfeitable property.

/s/
UNITED STATES ATTORNEY

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois May 9, 2007 9:00 o'clock a.m.
Defendants.	)	

VOLUME THIRTY-FIVE
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * * * * * * * * * * *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

Direct Examination of F. David Radler

* * *

[7940]

Q. Sir, who prepared the Non-Compete Agreements for APC?

A. Mark Kipnis prepared them. **[7941]**

Q. And did you read your Non-Compete Agreement in APC at the time you signed it?

A. Yes, I did.

Q. What was your understanding of what you agreed not to compete with?

A. I agreed not to compete with American Publishing for a period of -- and I'd have to go back to the agreement, but it was -- either three years or -- assuming it was three years. I'd have to go back to it, though, to look at it.

Q. At the time you signed your agreement, sir, what, if anything, did you understand what, if any, areas of the United States did you understand that you would be prohibited from operating a newspaper in?

A. Well, the only newspaper that -- that -- American Publishing still retained at that point was a newspaper in Mammoth, California.

Q. And beyond that newspaper, sir, what understanding, if any, did you have about what you would not be allowed to compete with?

A. That would have been it.

Q. Now, sir, let me direct your attention to what's in evidence -- and I'll just have you look up on the screen -- as Government Exhibit Filing 9-c.

And I will direct your attention, for the record, to Disclosure page 6. **[7942]**

MR. SUSSMAN: And for everyone else who has not memorized the exhibit numbers, this is the 10-K for Hollinger International filed in April of 2001. So, it is a 2000 10-K.

If you can go to the bottom paragraph under "Community Group."

(Brief pause.)

MR. SUSSMAN: I'll read under "Community Group."

"During 2000, the company sold virtually all of its remaining United States community newspapers for proceeds of approximately $215 million. Only one United States community newspaper was still owned at December 31st, 2000."

Sir, was this consistent with your understanding when you signed the APC Non-Compete Agreement in early 2001.

A. Yes, it -- it -- is.

MR. SUSSMAN: And, your Honor, if I could show the witness what's in evidence as Government Exhibit APC 18?

THE COURT: You may.

(Document tendered.)

BY MR. SUSSMAN:

Q. Sir, do you recognize APC 18?

A. Yes.

Q. What is APC 18?

A. It's a copy of the Mammoth Times.

Q. And what's the date of that publication?

A. This one is February 1st, but I don't know what year. I **[7943]** can't find the year.

February 1st, 2001.

MR. SUSSMAN: Your Honor, at this time the government would ask to publish this newspaper briefly to the jury.

THE COURT: You may.

MR. SUSSMAN: Thank you.

(Document tendered to the jury.)

(Brief pause.)

BY MR. SUSSMAN:

Q. Sir, is that newspaper, APC 18, the Mammoth Times, the newspaper -- did you understand whether that was the newspaper you were paid $2.6 million not to compete with?

A. That's correct.

Q. Now, was the Mammoth Times eventually sold?

A. Yes, it was.

Q. To what entity?

A. It was eventually sold to Horizon.

Q. Is Horizon the entity that -- who was -- who were -- at that time was that the entity that you and Mr. Black were owners of -- part owners of?

A. Yes, that is.

Q. How much was Horizon sold for?

A. It was sold for a dollar, plus working capital.

Q. What did you understand --

MR. SAFER: I'm sure -- your Honor, I'm sure -- that **[7944]** that was a miscommunication there. I don't think Horizon was sold for a dollar.

MR. SUSSMAN: Mr. Safer is right, your Honor. I misspoke.

THE COURT: Okay.

BY MR. SUSSMAN:

Q. How much was the Mammoth Times sold to Horizon for?

A. It was sold for a dollar, plus working capital.

MR. SUSSMAN: Thank you, Mr. Safer.

BY MR. SUSSMAN:

Q. What did you understand to be the purpose of the Non-Compete Agreement that you signed, sir, in APC?

A. Well, the purpose?

Q. Yes.

A. Well, I'd have to go back to the -- the purpose was -- it was a tax-generated non-compete.

Q. What do you mean when you say a "tax-generated non-compete"?

A. This was a -- this was a -- bonus that Mr. Black had authorized for the executives in this -- the executives that were--

MR. GENSON: Judge, objection to foundation. I don't know, what he says Mr. Black authorized, what he's referring to. We have no foundation.

THE COURT: Mr. Sussman? **[7945]**

MR. SUSSMAN: We already discussed an earlier conversation with Mr. Black.

MR. GENSON: Well, I didn't hear Mr. – I didn't hear that conversation – what was said in that conversation did not appear to comport with what he just said.

MR. SUSSMAN: Well, let me ask –

MR. GENSON: I would object.

THE COURT: Mr. Sussman?

MR. SUSSMAN: Let me see if he can direct the witness to the specific question.

THE COURT: Okay.

BY MR. SUSSMAN

Q. Which is, sir: Why did you understand that you were signing a Non-Compete Agreement in this – for APC for your $2.6 million?

A. I was signing it because this was a tax – there was a tax – benefit in signing it.

Q. What was your understanding of what the tax benefit of signing the non-compete was?

A. That there was a good chance that it would be tax-free in Canada.

Q. What would be tax-free, sir?

A. The non-compete payment.

Q. Did you – at the time you signed this Non-Compete Agreement, did you – have any intention of competing with any **[7946]** newspaper that APC owned?

A. No, I didn't.

Q. In fact, what was happening to APC as of February of 2001?

A. Well, as of February, 2001, APC had – really had – there was nothing left in it.

Q. And APC, itself, who was on the Board of APC?

A. I would have to look at the list, but I was on the Board and Conrad Black was on the Board. But I would have to look at the list for the others.

Q. So sir, did you under- -- did you have an understanding – let me back up.

Is it fair to say that you received your $2.6 million for agreeing not to compete against a newspaper company that you were on the board of?

MR. ROMANO: Objection, leading.

MR. GENSON: Objection. Leading.

THE COURT: Sustained

BY MR. SUSSMAN:

Q. Sir, did you report your $2.6 million payment in the APC transaction on your income taxes?

A. No, I didn't.

Q. Why not?

A. Because I was advised by tax counsel that it wasn't required.

Q. Now, what, if anything, did you tell your tax counsel **[7947]** about the fact that this was a Non-Compete Agreement set up solely for tax reasons?

MR. SAFER: Your Honor –

MR. GENSON: Objection.

MR. SAFER: -- Mr. Radler's conversations with his tax counsel are hearsay, irrelevant –

MR. SUSSMAN: I don't think they are irrelevant, your Honor.

MR. GENSON: They certainly are hearsay.

THE COURT: Well, how are they not hearsay?

It is one thing to say what his state of mind was and why he did or did not do something, but why is not his conversation with his tax counsel hearsay?

MR. SUSSMAN: Let me rephrase.

THE COURT: Okay.

MR. SUSSMAN: Let me see if he can rephrase the question, your Honor.

BY MR. SUSSMAN:

Q. Did you advise the Audit Committee or the Board of Directors for Hollinger International that you had received -- that you and other executives had received -- $5.5 million payment for agreeing not to compete with an International subsidiary?

A. No, I didn't.

Q. Why not? **[7948]**

A. well, at the time of the -- of the -- issuance of these checks, I was not aware that I was actually issuing money that belonged to Hollinger

International, as opposed to money that belonged to Ravelston.

Q. And did you advise -- at any point in time -- the Board that you had signed these Non-Compete Agreements?

MR. GENSON: Objection. Asked and answered.

THE COURT: Sustained.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois May 16, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTY-NINE
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

* * *

Cross-Examination of F. David Radler

[8992]

Q. I'd like to talk for a minute about APC.

The government asked you about money paid to you, Conrad Black, Jack Boultbee and Peter Atkinson for APC.

Do you recall that?

A. Yes.

Q. You received roughly $2.6 million, correct?

A. Yes.

Q. Mr. Black received roughly 6 -- $2.6 million?

A. Yes.

Q. Mr. Atkinson and Mr. Boultbee each received $137,500, correct?

A. That's correct.

Q. You testified on direct examination that at the time of the issuance of these checks, you were not aware that you were actually issuing money that belonged to Hollinger as opposed to money that belonged to Ravelston.

Do you recall giving that testimony?

A. Yes.

Q. Mr. Sussman did not ask you why you believed that the money paid out of the APC belonged to Ravelston, but I'd like [8993] to explore that with you for a moment.

You believed, did you not, that the APC payments were money that belonged to Ravelston because you understood that the APC payments represented a payment of management fees that had already been approved by the Audit Committee, correct?

A. Yes.

Q. And you understood that the Non-Compete Agreements were signed in connection with these payments in the hope that the recipients would minimize the taxes they'd have to pay, correct?

A. Say that -- there was a -

Q. You understood that the Non-Compete -

A. Right.

Q. -- Agreements were signed in connection with these payments in the hope that the recipients would minimize the taxes they'd have to pay?

A. Yes.

Q. Now, let's focus on management fees APC was supposed to pay in 2000.

I think you described it as a two-step process. Your responsibility was to meet annually with Governor Thompson and make a presentation regarding management services fees for Ravelston for the upcoming year, correct?

A. Yes.

Q. Once Governor Thompson agreed, the proposed fee would then **[8994]** be presented to the Audit committee by Governor Thompson, as you described it, correct?

A. Yes.

Q. And I think you also said that with minor variation, Governor Thompson, at least as far as you were -- when you were -- involved in the process, always agreed with the recommendation you made to him?

A. Yes.

Q. Now, after the fees for the year were approved, an allocation has to be made by someone to the various International entities, correct?

A. Yes.

Q. You were not involved in the allocation process, correct?

A. That's correct.

Q. You understood that someone would have to determine how much of the management fee expense would be assigned for payment by each of the subs?

A. Yes.

Q. One of the subsidiaries of International that received management services was APC, correct?

A. Yes.

Q. That was the case in calendar year 2000?

A. Yes.

Q. Now, you attended the Audit committee meeting on February 22nd, 2000. Do you recall that?

[8995]

A. Right. I would have to be

Q. All right.

A. Yeah.

Q. Let me ask you to look at Tab 49.

Tab 49 has been marked Atkinson Audit 23, and they're the Minutes of the Audit committee meeting of February 22nd, 2000.

Do you recognize the Minutes?

A. Yes.

MR. ROMANO: It might be easier, your Honor, if I just offer them.

THE COURT: Any objection?

MR. SUSSMAN: No objection.

MR. NEWMAN: No objection.

MR. GENSON: No objection.

MR. SAFER: No objection, your Honor.

THE COURT: I will admit it, and you may publish it.

MR. ROMANO: Thank you, your Honor.

BY MR. ROMANO:

Q. Now, these Minutes are what we call Minutes of the Annual Meeting of the Audit committee, correct?

A. Yes.

Q. Early in the year, usually in February, the Audit Committee meets with the auditors and they go through the **[8996]** annual ritual of retaining the outside audit firm and reviewing the audit plan for the year, correct?

A. Yes.

Q. Representatives of KPMG were present at this meeting, correct?

A. Yes.

Q. Pat Ryan?

A. Yes.

Q. Jim Winikates, someone called Dan Creamean?

A. I don't -- I knew Pat Ryan, so I didn't know the others.

Q. They made a presentation about their auditing procedures and their major areas of audit, as they usually do annually, correct?

A. Yes.

Q. The Audit committee appointed KPMG as the auditors for the year 2000, correct?

A. I think the -- I think they would recommend them, right?

I don't know that they could appoint them, but --

Q. Fair enough.

Recommended the appointment of KPMG for the year 2000, and they were ultimately appointed, correct?

A. Yes.

Q. The Audit Committee also approved a 2000 annual payment of $24 million for the management services by Ravelston to International, correct?

[8997]

A. I'm just looking that up.

Q. It's on the second page under Item 6 -- Roman VI.

A. Yes.

Q. And the Audit committee approved a recommendation to the Southam Board that it approve a 2000 annual payment of $18.5 million for services provided by Ravelston to Southam, correct?

A. Yes.

Q. Now, you told Mr. Sussman that you had a conversation with Conrad Black in late December,

2000, or early January, 2001, about payments to executives totalling $5.5 million.

Do you recall that?

A. Yes.

Q. In early February, 2001, you asked Roland McBride to tell you whether there were proceeds remaining from various U.S. community sales.

Do you recall that?

A. Yes.

Q. Let me ask you to take a look at Tab 50, which is a document marked Atkinson Exhibit APC 5.

Do you see that?

A. Yes.

Q. Now, that's a memo from Roland McBride to you dated February 2, 2001, discussing unallocated reserves from various transactions. **[8998]**

Do you see that?

A. Yes.

MR. ROMANO: Your Honor, the gov- -- your Honor, Mr. Atkinson -- offers Defendant Exhibit APC 5 Atkinson.

THE COURT: Any objection?

MR. SUSSMAN: One moment, your Honor.

(Brief pause.)

MR. SUSSMAN: No objection, your Honor.

MR. SAFER: No, your Honor.

MR. CORBETT: No, your Honor.

MR. NEWMAN: I think it may -- I'm sorry.

MR. ROMANO: Is it already in?

MR. NEWMAN: The answer to my question may be answered.

MR. SUSSMAN: I think Mr. Newman's right. It looks familiar to me at least.

MR. ROMANO: I'm happy to use the other number just to not clutter the record or --

MR. GENSON: Either way, there's no objection.

MR. ROMANO: -- cause any confusion.

THE COURT: Mr. Genson, was there an objection from you.

MR. ROMANO: JB General 16, apparently.

THE COURT: Okay.

BY MR. ROMANO:

[8999]

Q. This exhibit goes by two different names, Mr. Radler.

MR. NEWMAN: Anyway, I remembered one of my exhibits, Judge.

MR. ROMANO: May I proceed?

THE COURT: You may.

BY MR. ROMANO:

Q. Now, in this memorandum, whether it's JB General 16 or Atkinson APC 5, you're asking Mr. McBride for information about unallocated reserves, correct?

A. Yes.

Q. Now, a reserve is an amount that's set aside for future use, correct?

A. Yes.

Q. It's common when selling newspaper assets, isn't it?

A. Yes.

Q. An unallocated reserve is a reserve that's been – not been -- identified for a specific purpose, correct?

A. Yes.

Q. You understood that APC had liabilities in 2000 for which it had set aside reserves, correct?

A. Yes.

Q. One of APC's liabilities was its obligation to pay a portion of the Ravelston management fee, correct?

A. Would you repeat that question?

Q. One of APC's liabilities was its liability -- one of its **[9000]** obligations -- was to pay a portion of the Ravelston management fee?

A. Yes. I prefer "obligation." I agree.

Q. And the fee for 2000 had been approved by International's Audit Committee. we just saw that, correct?

A. Yes.

Q. So, on February, 2001, you instructed Roland McBride to make four payments totalling $5.5 million to you, Mr. Black, Mr. Boultbee, Mr. Atkinson effective year-end 2000, correct?

A. Correct. Correct.

Q. And you take a look at Tab 7 in the other binder, a document we've talked about already. It refers to a direction that you had given Mr. McBride.

Do you see that?

A. Yes. Yes, I do.

Q. Each of the recipients of these payments -- you, Conrad Black, Jack Boultbee and Peter Atkinson -- were then employed by Ravelston, correct?

A. Yes.

Q. You referred to these payments as bonuses that had been authorized.

Do you see that?

A. Just a moment.

In -- in Tab 7?

Q. Earlier in your testimony. **[9001]**

A. Yes.

Q. Now, by signing -

MR. SUSSMAN: One moment.

BY THE WITNESS:

A. I'm sorry, I -- that's -

(Brief pause.)

BY MR. ROMANO:

Q. Now, by signing the APC Non-Competition Agreement, there was a good chance -- or at least a reasonable prospect – that the payment would be free of taxes in Canada, correct?

A. Yes.

Q. And when you gave the instruction that you gave, you understand -- you understood -- that the payment was part of unpaid, but approved management fees owed to Ravelston, correct?

A. Yes.

MR. ROMANO: May I have a moment, your Honor?

THE COURT: Yes.

(Brief pause.)

MR. ROMANO: I have no further questions.

* * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 5, 2007
Defendants.	)	1:45 o'clock p.m.

VOLUME FIFTY
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE

* * * * * * * * * * *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

* * *

Direct Examination of Jinyan Yi

[12279]

Q. And the money that's paid under that Non-Competition Agreement is called a non-competition payment?

A. Typically, yes.

Q. Did something happen in the law in 1999 that changed the treatment of non-compete payments under the Canadian tax laws?

A. Yes. In 1999, the federal court of appeal ruled in a case called Fortino that non-competition payments were not taxable.

In other words, if we could go back to the list example I used, non-competition payments were considered to be off the list and they were tax free. And the law became clear after the decision.

Q. Could you tell us a little bit about the Fortino case, please.

A. Yes, the Fortino case is the leading case dealing with non-competition payments in Canada. In the Fortino case, Mr. Fortino and his family ran a very successful grocery store in a city called Hamilton in Canada, and a big company that operates a chain of grocery stores called Loblas wanted to buy the Fortino store.

Mr. Fortino and his family members -- in the case, if I could simplify it, there are eight couples of taxpayers, eight husbands and eight wives and eight couples together. I'll just use Mr. Fortino for simplicity reasons. **[12280]**

So the purchaser wanted to buy the Fortino store from Mr. Fortino, and the purchaser was also

interested in entering into a non-compete agreement with Mr. Fortino.

So during the negotiation process, Mr. Fortino was interested in structuring the purchase price in the most tax-advantageous way, so they -- Mr. Fortino suggested that his wife be added to the Non-Competition Agreement and the purchaser agreed.

So both Mr. Fortino and his wife signed a Non-Competition Agreement, and so the purchase price was allocated, actually a large portion of the purchase price was allocated to non-compete payments. And if -- if there were no non-competition payments, non-compete payments, the money received by Mr. Fortino would be taxed as capital gains because they sold the shares of the company that owned the Fortino store.

Through -- again, through the use of non-compete payments, you could go back to the Duke of Westminster case, the taxpayer kind of restructured the payments to include non-compete payments, and the taxpayers didn't report non-compete payments as taxable income. And, again, the government disagreed, so the case went to court.

The trial court agreed with the taxpayer and ruled that non-competition payments had no source; i.e., there's no productive source for receiving for this payment, so they were **[12281]** tax free in Canada, and –

Q. I'm sorry.

A. So the Fortino case in 1999, the federal court of appeal agreed with the trial court decision in deciding that these payments were tax free.

Q. In the Fortino case, the purchasers of the grocery stores just wanted a non-compete from Mr. Fortino?

A. Initially, yes.

Q. And then you said Mr. Fortino requested to add his spouse to the non-Competition Agreement?

A. Right, according to the facts of the case, yes.

Q. And the tax benefit – or if you could explain, what was the tax benefit to the spouse as a result of adding her to he non-compete agreement?

A. Well, the – tax benefit was quite obvious. Receiving the non-compete payments by the wife achieved what tax people call income splitting. You split the income between the husband and the wife, so future income earned by the amount of the money they receive will be taxed to the wife.

And in many family situations, the wife earns less income. So you want to have a lot of income earned by the low income partner of the family so you get lower tax. So the restructuring is mostly for tax reasons.

Q. And how was the non-compete payment that was made to the wife, after Mr. Fortino added her to the non-compete, treated? **[12282]**

A. They were – they were tax free at that moment.

Q. And – I'm sorry.

A. Sorry. And in that case, if I again go back to the Duke example, the government didn't challenge the validity of the non-compete agreement entered into by Mr. Fortino or by Mr. Fortino's wife. It was accepted as legally valid non-complete agreements.

So the tax issue was how to tax the non-compete payment, whether that's taxable or not.

Q. And what was the significance of this Fortino case after it was decided in 1999 until about 2003?

A. It was very important, practically speaking, because many business owners used non-compete payments as a big component in their – in their deal, in the sale of their business. And many vendors, in fact, actually requested non-compete payments be used as part of the payment structure.

And – and also just for a law professor, I care about legal principles. The Fortino case also reaffirmed the principle I told you about from the Duke of Westminster case. The principles are taxpayers are entitled to structure their transactions in the most tax-efficient manner; i.e., to save taxes.

And the second principle is characterization of that payment is governed by the contract entered into by the taxpayer and other party. And the legal reality, how the **[12283]** taxpayer reacts to that payment they receive is not relevant. It's the characterization or the label used by the taxpayer in the contract to describe it, as long as the correct is bona fide and legally enforceable.

Q. So in light of the Fortino case, how were non-competition payments treated under the Canadian tax laws between 1999 and 2003?

A. During that period of time, non-compete payments were tax free, and very clearly the point was clearly made by the decision in the Fortino case.

Q. And to get the tax-free treatment on the non-compete payment, did it matter who the buyer or the seller, who requested the Non-Competition Agreement?

A. No. It's what is – what matters is the contract that was entered into by the parties and the contract was legally enforceable.

Q. So –

A. So who requested doesn't really matter. In the Fortino case, for instance, the non-compete agreement entered into by the wife was requested by Mr. Fortino's family, not by the purchaser.

And, in fact, entering into that non-compete agreement with the wife didn't seem to change the total price paid by the purchaser. The purchaser agreed to and signed a contract with them. **[12284]**

Q. So even if the seller were to request a Non-Competition Agreement or if the seller were to request a Non-Competition Agreement, how would – how would the non-compete payments under that agreement be treated during this 1999 to 2003 time frame?

A. It wouldn't be treated differently; and, again, I don't want to use the Duke example too often; but in typical tax-planning structures, very often is one party who is tax motivated, want to save tax. So in the Duke's case, it's the Duke who want to claim the deductions.

The gardeners received the same amount of income for their purposes, and in the Fortino case, the purchaser didn't suffer any economic loss and it's the seller, Mr. Fortino, and his family gained economically by saving taxes.

So very often in this sort of structuring, one party is highly motivated and the other part is indifferent, and they sign a valid, legally enforceable

contract, and the court recognized the validity of that contract for tax law purposes.

* * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois April 27, 2007
Defendants.	)	8:45 o'clock a.m.

VOLUME TWENTY-EIGHT
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * * *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

* * *

Direct Examination of Marie-Josee Kravis

[6029]

Q. Now, let's talk a little bit more about your own roles on the Board and on the Audit committee, Ms. Kravis.

Are you familiar with a concept called, "fiduciary duty"?

A. I am.

Q. How are you familiar with that concept?

A. Well, I'm familiar with that concept in terms of my experience on Boards of Directors.

Q. Based on your experience as a Board member for various companies including Hollinger International -- what is your understanding of a Board member's fiduciary obligation?

A. Well, the fiduciary obligation calls for putting the interests of the shareholder first, and that's of all shareholders.

Q. As a Board member for Hollinger International, did you owe fiduciary duties?

A. Yes.

Q. To whom?

A. To all the shareholders of Hollinger International.

Q. As an Audit committee member at Hollinger International, did you have fiduciary duties? **[6030]**

A. I did.

Q. And to whom did you owe those duties?

A. To the shareholders of Hollinger International.

Q. Now, we talked before about the Canadian company Hollinger, Inc. At the time that you were on

the Board of Hollinger, Inc., did you have fiduciary duties to that company's shareholders?

A. I did.

Q. Once you became a Board member of Hollinger International, how, if at all, did the scope of your responsibilities to Inc. change?

A. Well, I continued to have fiduciary duties towards the shareholders of Hollinger, Inc., because they were shareholders of Hollinger International.

But, in addition to that, I had fiduciary responsibility to all the other shareholders of Hollinger International.

Q. Did you understand the Audit Committee or the Board of Directors to be required to put Hollinger, Inc.'s interests over those of other shareholders?

A. No.

Q. Were you able to put Conrad Black's interests over those of other shareholders?

A. No.

Q. Now, this management -- some of the management that we've [**6031**] discussed: Mr. Black, Mr. Radler, Mr. Boultbee, Mr. Atkinson and Mr. Kipnis -- did you understand them to have duties to Hollinger International and its shareholders?

A. Yes, I did.

Q. What kinds of duties?

A. Well, they had the same fiduciary duties, and duties of loyalty, to those shareholders, as any other director.

Q. Did your knowledge that this management team had fiduciary duties, did that impact your own

service as a Board member and an Audit committee member?

A. Well, to the extent that I felt that all of our duties and interests were aligned, yes.

Q. How so?

A. Well, because we were all part of the same Board of Directors and the senior officers were part of the same company, and we have the same duties.

* * *

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois May 1, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTY
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * * *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

* * *

Direct Examination of John Thompson

[6671]

Q. Are you familiar with a concept called fiduciary duty?

A. Yes.

Q. How are you familiar with that concept, sir?

A. Through 48 years of the practice of law and Board service.

Q. Sir, let me ask you, if you can, to direct your attention to your experience as Board -- when you answer these questions about fiduciary duty --

A. Yes.

Q. -- to your experience on Boards.

A. Okay.

Q. And I'm going to ask you these questions with respect to your understanding as a Board member about fiduciary duty.

A. Okay.

Q. Based on your experience at Hollinger as a Board member, did you have a fiduciary duty to -- did you have a fiduciary duty?

A. Yes, sir.

Q. And to whom?

A. To the company and to its shareholders.

Q. And what did you understand that duty to be?

A. The duty of loyalty, the duty of care, the duty of good faith.

Q. What did you under -- what, if anything, did you **[6672]** understand that that required you to do with

respect to the shareholders at Hollinger International?

A. To represent to the best of my ability, under the business judgment rule, the interests of the shareholders.

Q. And did you make distinctions between and amongst the shareholders?

A. No.

Q. Did you have an understanding as to whether the management team at Hollinger International -- the executives, the officers -- had fiduciary duties to Hollinger International?

A. Absolutely.

Q. What was your understanding?

A. That they had the same duties that I, as a member of the Board, did and that Delaware law -- where the company was incorporated -- commanded.

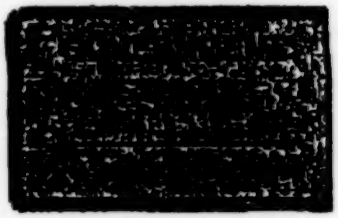
Q. And what, if any, influence did those duties have, that you understood the officers had, what influence, if any, did that have on the performance of your duties as a Board member and an Audit Committee member?

A. Well, I presume that under a duty of loyalty to the company and fiduciary duty, that the officers and employees of the company would have dealt fairly and honestly with the Board or any of its committees.

* * *

APPENDIX K

[Government Exhibit APC 13]



NONCOMPETITION AGREEMENT

This Noncompetition Agreement (this "Agreement") is entered into as of this 31st day of December, 2000 by and between J.A. Boultbee ("Officer") and American Publishing Company, a Delaware corporation ("Company").

RECITALS:

A. Company is and has been in the business of publishing newspapers, shoppers and other niche publications located throughout the United States (collectively, whether now owned or bought in the future, the "Publications").

B. Officer has been a long-time officer of Company or one of its affiliates, and has been instrumental in Company's historical success.

C. Company's ability to successfully publish the Publications will be irreparably hindered should Officer engage in competitive activities as set forth herein.

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants of the parties

herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Consideration. In consideration of Company's concurrent payment to Officer of $137,500, Officer hereby agrees to be bound by the terms and restrictions set forth herein.

2. Confidentiality, Non-Solicitation and Noncompetition.

(a) Confidentiality. Officer agrees that Officer has, during the course of Officer's involvement with the publishing of the Publications, been given access to and possession of certain valuable and confidential information, both verbal and written, proprietary to Company, relating to Company and the Publications, which information is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use, including, without limitation, lists of actual or potential subscribers, names of advertisers, customers, suppliers or other third parties having a business relationship with Company, pricing policies, product development and plans, as well as marketing and promotional plans, strategies and information regarding accounts, personnel files, contracts and agreements, trade secrets and other information, documents and materials regarding the past, present and future operations of the Publications (all of such proprietary and confidential information and business relationships and any other proprietary and confidential information collectively referred to as the "Confidential Information"). Officer covenants and agrees that Officer shall forever hold in

confidence and not use, furnish, make available or disclose, directly or indirectly, to any person, corporation, partnership or other entity any Confidential Information that Officer has obtained, had access to, or has created during the course of Company's publishing of the Publications or Officer's involvement with the publishing of the Publications. Officer further covenants and agrees that Officer, upon termination of his employment, will deliver to Company all tangible forms of such Confidential Information in **[2]** Officer's possession or control and, in addition thereto, any and all other information that Officer may have with respect to Company or the Publications and will not retain any copies of such Confidential Information.

(b) Non-Solicitation. From and after the date of Officer's termination of employment and for the three (3) year period following the date thereof, Officer covenants and agrees that Officer shall not, directly or indirectly, call on or solicit, or attempt to call on or solicit, any advertiser or subscriber of the Publications for purposes of inducing or encouraging such person or entity to discontinue or curtail its business relationship with the Publications, or otherwise directly or indirectly induce or encourage any person or entity to discontinue or curtail their business relationship with the Publications.

(c) Noncompetition. From and after the date of Officer's termination of employment until the third (3rd) anniversary thereof, Officer shall not directly or indirectly:

(i) own, manage, operate, be employed by, render services for, engage in, invest in, consult with, control or participate in, or be associated with in any manner whatsoever,

directly or indirectly, or be connected with, or have any financial interest in or aid or otherwise assist any person or entity in the conduct of, or otherwise engage in, the business of print or electronic publications (whether it be joint venture, a partnership, corporation or other entity) located, operating or with distribution anywhere within a twenty-five (25) mile radius of the center of any U.S. county that is the primary focus of any Publication then owned by Company or any of its affiliates at the time of Officer's termination of employment (the "Restrictive Area"); provided, however, that the foregoing shall not be deemed to prohibit Officer from (A) acquiring shares of stock in a publicly-owned corporation or entity so long as such ownership, directly or indirectly, does not exceed ten percent (10%) of the total outstanding stock of such publicly-owned entity, measured by reference to either market value or voting power, and (B) maintaining any ownership, management, operation, employment, etc. which Officer had as of the date of termination of his employment;

(ii) solicit, employ, recruit for employment, or otherwise encourage any employee of the Publications to terminate his or her employment with the Publications or to enter into employment with any other person, firm, corporation or other entity; or

(iii) in any way slander, libel or through any other means take any action that is intended to be detrimental to Company, its

services, personnel or operations (including, without limitation, the Publications) or Company.

If any provision or part of this Section 1(c) is held to be unenforceable because of the duration of such provision or the area covered thereby, Company and Officer agree to modify such provision, or agree that the court making such determination shall have the power to modify such provision, to reduce the duration or area of such provision, or both, or to delete specific words or [3] phrases herefrom ("blue-pencilling") and, in its reduced or blue-pencilled form, such provision shall then be enforceable and shall be enforced.

(d) Equitable Remedies. It is recognized and agreed the business of Company is conducted throughout the Restrictive Area and therefore, the geographical scope of the covenants contained herein is reasonable. Officer agrees that the covenants contained in Subsections 1(a), (b) and (c) hereof are vital to the operation, viability and continued success of the Publications. In that regard, Officer agrees that any breach or threatened breach of Subsections 1(a), (b) or (c) hereof would cause irreparable and immediate harm to Company and that money would not be an adequate remedy in the event of any such breach. By reason of the foregoing, Officer agrees that Company shall be entitled to injunctive or other equitable relief in the event of any breach or threatened breach of the Agreement, without the necessity of proving actual damages by reason of such breach. Officer hereby irrevocably waives any claim or defense that an adequate remedy is available at law and agrees not to interpose any claim or defense that an adequate remedy at law

exists. Nothing herein shall prevent Company from electing to seek any monetary or other relief in addition to or in lieu of any equitable relief for breach or threatened breach of the foregoing Subsections. The failure of Company to promptly institute a legal action upon any such breach shall not constitute a waiver of that or any other breach hereof.

(e) Alternative Services. Officer agrees to the reasonableness, applicability and nature of the covenants contained herein and further agrees that the time periods and scope are the appropriate, minimum and reasonable time periods and scope necessary to protect Company in the conduct of publishing of the Publications and that Officer's capabilities and experience are such that the enforcement of this Agreement will not prevent Officer from earning a livelihood.

3. General Provisions

(a) Notices. All notices hereunder shall be in writing and shall be deemed to have been given or made on the date of delivery, provided delivery is actually tendered at the appropriate address, addressed to the persons identified below (i) in person, or (ii) by nationally recognized overnight courier service, or (iii) by facsimile copy (with original copy mailed the same day), or (iv) three (3) calendar days after deposit in the mail by first class certified mail, postage prepaid, return receipt requested, to the parties at the following addresses (or at such other address for a party as shall be specified by like notice):

If to Officer, to:

J.A. Boultbee
85 Edenbridge Drive
Etobicoke, Ontario M9A 3G5
Canada
Fax: 416-236-4095 [4]

If to Company, to:

American Publishing Company
401 North Wabash, Suite 740
Chicago, Illinois 60611
Attention: Mark S. Kipnis, Esq.
Fax: (312) 321-0629

(b) Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the internal laws of the State of Delaware.

(c) Assignment. This Agreement and the rights and obligations of the parties shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns. In addition, Company may assign this Agreement, in whole or in part, to any affiliate of Company or otherwise as part of the sale or transfer to any party of substantially all of the assets of the Publications.

(d) Entire Agreement; Amendments. This Agreement constitutes the entire agreement between the parties hereto with respect to the matters contemplated by this Agreement, and supersedes all negotiations, representations, warranties, offers, contracts and communications (oral or written) prior to or contemporaneous with the date of this Agreement. Any and all amendments, waivers, consents and modifications to this Agreement may

only be made by an instrument or instruments in writing signed by the parties to this Agreement.

IN WITNESS WHEREOF, the parties have executed this Noncompetition Agreement as of the day and year first above written.

AMERICAN PUBLISHING COMPANY

By:/s/_____
Its:/s/_____

/s/_____
J.A. Boultbee

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 18, 2007
Defendants.	)	8:45 o'clock a.m.

VOLUME FIFTY-EIGHT
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * * *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

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Excerpts from Government Summation

[13631]

BY MS. RUDER:

Ladies and gentlemen, we are not here because somebody made a mistake. We are not here because somebody forgot to dot their i's or cross their t's. We're not here because somebody forgot to identify something as a related-party transaction. **[13632]** We are here because five men -- these four defendants (indicating), together with David Radler -- systematically stole over $60 million from the shareholders of Hollinger International; and, because these same five men checked their fiduciary duty to the shareholders of the company at the doorstep.

Did they try and cover their tracks? You bet they did.

Did they try and leave behind a phoney paper trail that would make their actions appear legitimate, a cover story? That is exactly what they've done.

Ladies and gentlemen, it is time, and it will be your job, to expose this cover story for the lie that it is.

These men had a duty. They had a duty to be honest. They had a duty to be fair and loyal to the shareholders of Hollinger International. That means something. It means something, ladies and gentlemen. But the evidence has shown in this case that it did not mean anything to these defendants. Their duty was to each other. Their loyalty was to each other. Their loyalty was to the scheme.

Conrad Black fancied himself a proprietor. He could have a 747 if he wanted. No sackcloth and ashes for Conrad Black. It was his company and he could do with the company and its money as he pleased.

David Radler, Peter Atkinson, Jack Boultbee and Mark **[13633]** Kipnis, they were part of his team. They went along with Mr. Black's approach to the company because it benefitted them, because it enriched them.

And because the top four executives could not take all the money that they wanted from the company openly and honestly, they lied about it. They lied to the shareholders about the true reasons why over $60 million went not to the shareholders, but instead to the top four executives and to the company that Mr. Black controlled -- Hollinger, Inc.

They stole money and property from Hollinger International. They robbed the shareholders of their right to honest services, to honest executives who were focused on doing their job loyally for the company. That is fraud.

Now, there are a lot of legal terms that define these men's crimes, but what it boils down to is really quite simple: Conrad Black, David Radler, Jack Boultbee and Peter Atkinson decided on their own to take a slice of the company's profits -- the profits that they were making on these U.S. and Canadian newspaper deals -- and, with Mark Kipnis' help, they created a phoney paper trail to make their actions appear legitimate.

There is a great divide in this criminal case. On one side of this great divide, you have the defendants and Mr. Radler. They knew the truth.

They knew the truth about why these payments were really being made. **[13634]**

Everybody else in the case from the Audit Committee to the auditors at KPMG to the lawyers at Torys, the lawyers at Cravath, the inside accountants, other people at the company and, most importantly, to the shareholders of Hollinger International, they were on the other side of the great divide. They did not know the truth. They did not know the facts about why these payments were being made.

Now, sure, some of the people knew that money had been paid to Inc. And some of the people knew eventually that money had been paid to the top executives. But, ladies and gentlemen, they didn't know the real reason why. And that is the heart of this case. That is what this case is about.

It's not about the fact that money was paid. On its own, that wasn't the fraud. Where you see the fraud and where the crime is that we're going to be talking about today is the way that defendants hid and lied and concealed the true reasons why. And what I mean by that, it all has to do, it all comes back to the buyer's request. That is the single most critical, most important fact -- most important fact -- in this fraud scheme.

The reason why the buyer's request is so critical here is because unless the buyer requested it; unless the buyer required it; unless the buyer absolutely, positively would not do the deal unless a non-compete was entered into and unless money was paid, then there is no reason -- there's **[13635]** no justification -- for taking that money away from the shareholders and giving it instead to Hollinger, Inc., and to the executives. No reason at all.

It's the buyer's demand that is the only justification for why this money doesn't go to the company -- as it was initially supposed to -- but instead goes somewhere else. It's the most important thing.

Now, months ago -- about three months -- ago the lawyers in this case presenting opening statements to you -- and this is one of the slides that Mr. Cramer used in his presentation.

What Mr. Cramer told you, on behalf of the government, is that you would hear evidence in this case that the defendants made statements to the shareholders and to others about these non-compete payments to Inc. and to the executives. And what the defendants told people, what they told the shareholders, was that these non-compete payments were made because they were requested by the buyers; because they were critical conditions of closing; that they had been approved by the company's independent directors; and, that they were made in connection with newspaper sales.

Mr. Cramer told you the evidence would show that those statements defendants had made were false, these non-competes had not been requested by the buyers; that they, in fact, were not critical conditions of closing. The buyers **[13636]** would have closed, anyway. The buyers didn't care.

He told you the government would prove that the independent directors had not approved the terms of these payments and that, on top of that, you would see evidence that some of these payments were not even made in connection with newspaper sales.

We have proved all of that to you beyond any reasonable doubt. That has been the evidence in this case.

Now, here's what I intend to cover today. This has been a very long trial. It is utterly impossible for me to cover everything, to go back over all the documents, all the testimony. I'm not even going to try because we'd be here for three more months.

There are four crimes that are charged in this case: Mail and wire fraud, tax fraud, racketeering, and obstruction. The last two are against Mr. Black alone. The first two are against all four defendants. And we are going to talk through all of those.

The very, very large bulk of what I'm going to talk to you about today is the mail and wire fraud because that really covers most everything in the case. The obstruction has a different set of facts, and we'll cover that at the end. But the very large bulk of my remarks today is going to be on the mail and wire fraud schemes.

What I'm going to do here is cover all the **[13637]** non-compete stuff first, both the U.S. and the CanWest non-compete schemes. And, then, we're going to take a step back and I'm going to talk to you separately about each one of the four defendants -- Mr. Black, Mr. Boultbee, Mr. Atkinson and Mr. Kipnis -- to re-emphasize for you the government's proof that each one of these men knowingly, intentionally participated in this fraud scheme; that each one of the four of them is guilty beyond a reasonable doubt of this fraud that we have alleged and we have proved.

And, then, we will come back and pick up the perks, which is one of the fraud schemes, and we'll cover the racketeering and the obstruction.

Now, I am not going to spend much time today on the law. Judge St. Eve, at the very end of all the lawyers' arguments, she will give you a very detailed set of jury instructions. From time to time, I will show you either a summary or the actual part of one of the instructions that I expect the Judge will give you. But I do not intend, and it's not my job, to go through all of the law with you.

It's also -- excuse me.

(Brief pause.)

BY MS. RUDER:

It's also, as I said, not possible for me to cover all of the facts. But you members of this jury have been extraordinarily attentive over the past few months. We've **[13638]** seen you take notes. We've seen you paying attention. And you already have -- before I say anything more, you already have -- the tools that you need, along with the Judge's instructions, which you'll get, because you know this case and you have your common sense. What I want to do is highlight for you -- I want to emphasize -- certain points that we think will be useful to you in your deliberations.

So, we're going to start with mail and wire fraud. These are not the detailed instructions that you're going to get, but this is just a summary.

But there are three parts of it. First, we have to show you that there was, in fact, a scheme -- a scheme to defraud. In this case, there were three:

The U.S. non-compete scheme, the CanWest scheme, and the perks scheme.

We also have to show that this wasn't all a big mistake; these defendants did this knowingly; they had intent to defraud the company.

And we also have to show -- because this is mail and wire fraud, we have to show -- that the mails and wires were used as part of this. Wires are things like e-mails, faxes, and so on. So, we will cover this.

One thing I want to mention, though, before I get started with the scheme, part of the intent to defraud that we're talking about in this case is very common sense. The defendants stole money and property from the company. That's **[13639]** one of the theories behind this fraud.

There's also a second theory, and we are alleging both. The second theory has to do with something called honest services. And I expect the Judge will instruct you that a corporation's officers -- which includes all four of these defendants -- as well as its directors and controlling shareholders -- which also includes Mr. Black -- owe a fiduciary duty of loyalty to the corporation and its public shareholders.

What does that mean? The duty of loyalty requires that the directors, officers and controlling shareholders act in the corporation's best interest; that they refrain from taking actions that either conflict with the corporation's interests or that harm the corporation. And I mention this to you right at the outset because it is a common thread that runs through what we're going to be talking about today.

Stealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious; and, it's part of the fraud that is alleged in this case.

Let's start with the U.S. non-compete scheme. Conrad Black, together with David Radler and other members of his team, built up Hollinger International so that by the time we get to the late 1990s, when all of this starts, it's the **[13640]** massive newspaper empire you've all heard so much about. Some very large papers like the Sun-Times, the National Post, the Telegraph; and, some very small papers, these community newspapers, both in the united States and in Canada.

But it took money to build up this empire. And in the late 1990s, Mr. Black decided that it was time to start to sell, to shift the company's strategy. Mr. Black and Mr. Radler presented that strategy to the Board and the Board agreed. There was nothing wrong with the strategy.

But what happened next is that Conrad Black and Mr. Radler used this decision to sell off the company's papers as an opportunity to steal. Mr. Black and Mr. Radler went out together to find buyers for these U.S. Community newspapers; and, as things progressed -- as things progressed -- they realized that they could use one of the tools of their trade, one of the standard typical things that happen in these newspaper sales -- a non-compete agreement, a little side agreement that normally doesn't get a lot of play, a lot of attention in these transactions.

But they realized they were going to be able to use this non-compete as a device to move money

away from Hollinger International and to, in the first instance, Hollinger, Inc., a company that Mr. Black controlled.

* * *

[13699]

And, ladies and gentlemen, I told you at the beginning that this is partly about the theft of money. And it is, because this is stealing 9-and-a-half million bucks. But there's the other part of it, too. That loyalty, that honest services that all five of these men owed to the company. Mr. Black owed it, Mr. Radler, Mr. Boultbee, Mr. Atkinson, and Mr. Kipnis. Every single one of them.

In this deal, they robbed the shareholders of that, too. Because Conrad Black and David Radler and Jack Boultbee and Peter Atkinson, they have an obligation to protect the company's money, to protect the assets. If the buyer wasn't requiring it, they had a duty to make sure that that money went to the shareholders.

Mark Kipnis had the same duty. And he knows as well as anyone -- he is on the front lines talking to Mr. Reed and Mr. Henson. He knows they're not requiring this. He knows they're not requesting it. He knows $9-and-a-half million is nowhere in the contract. What is he doing when he takes out his pen and gets that money to the top four executives? That is a violation of his duty of loyalty. It is not honest services.

All of these defendants stole that. They stole the money and they stole the trust, the loyalty that these **[13700]** shareholders had every right to expect.

December 4, 2000, is about two weeks later, after this money in CNHI II that I'm talking about was taken. And there's a Board meeting on December 4, 2000. We know that all of this had been done. These Executive Committee consents, CNHI II, Paxton and Forum. The Board hadn't been told anything. The Audit Committee hadn't been told. The shareholders didn't know about this 9-and-a-half million.

So, now here they are, all of them -- this is the Minutes from the December 4, 2000 meeting. Mr. Black, Mr. Radler, Mr. Atkinson, Mr. Boultbee, Mr. Kipnis, they're all sitting there with the Board.

What are they going to tell the Board about what they've just done? Mr. Black presents a set of resolutions -- a set of resolutions -- to the Board of Directors. Some of them are really standard, "Approved the Minutes from last time," "We're going to issue a dividend to the shareholders."

And, "Oh, by the way, Board of Directors, we're asking you to confirm and ratify the actions taken by the Executive committee since the last Board meeting."

And it says, "the Board reviewed the resolutions attached hereto as Exhibit A."

And we're looking here (indicating), ladies and gentlemen, at Government Exhibit Board 1D. This is what the Board saw (indicating). This is what they were given, not **[13701]** those more detailed Executive Committee Consents that had been signed by all three of the members; the ones signed by Mr. Black, Mr. Radler and Mr. Perle. This is all the Board got (indicating).

They got three bullet points that say, "On September 15, 18 and 19, the Executive committee authorized and approved the sale of certain assets: CNHI, Paxton, Forum." That's it. The Board isn't told anything about the money going to Hollinger, Inc. And they're certainly not told about the 9-and-a-half million.

And why is it that these five defendants remained silent? Why don't they say anything?

Well, Conrad Black, he had 4.3 million reasons not to speak up at that Board meeting; not to tell the members of the Board the truth about these Executive Committee consents that he was presenting to them for approval and ratification.

Mr. Radler had the same thing.

Mr. Boultbee had 450,000 reasons to sit there with his mouth shut.

And so did Peter Atkinson.

What about Mark Kipnis, ladies and gentlemen? Mark Kipnis, at the same time as these other guys, got a $100,000 bonus.

* * *

[13726]

That's not what this case is about. It's not about the fact that money was paid to Mr. Atkinson. It's not about the dollar amounts. It's about why. Why was that money paid to Peter Atkinson. It says here that it was a condition to the transaction. That's not true.

And, listen, if defense counsel wants to parse out that language and say, "Well, it was technically a condition to the transaction because there was in the

contract on page whatever a little subsection that says, 'Conditions of Closing.'"

And do you see Peter Atkinson's name right there (indicating)? Well, that's part of the cover story, too, ladies and gentlemen. That's the paper trail that they left behind to be able to argue something like this.

Because the truth of it is CanWest did require it to close the deal. And that's what matters. It's not whether you can construct an argument later based on a contract. They had a duty of loyalty to refrain from doing things that would harm the shareholders' interests.

And because they had that duty of loyalty, this (indicating) doesn't fly, ladies and gentlemen. It does not fly. You can't make up an after-the-fact argument using lawyer terms like "condition of closing" and point to some paragraph and say, "well, see, it says right here, 'Condition **[13727]** of Closing.'"

MR. SCHACHTER: Your Honor, objection. This is getting into legal conclusions. There is -- the law is -- Ms. Ruder is misstating the law. To suggest that the duty of loyalty requires anything in particular about this disclosure, that's incorrect.

THE COURT: Ladies and gentlemen, I will instruct you on the law that applies to this case after we have heard all of the closing arguments.

The Court's instructions on the law are mandatory for you to follow. So, you will hear the law from the Court at the end of the closings.

You may proceed.

BY MS. RUDER:

Yes.

And I do expect, ladies and gentlemen, the Judge will give you a specific instruction on what the duty of loyalty requires. And I am confident, when you hear that instruction, which does require Mr. Atkinson, along with the others, to refrain from taking actions that harm the shareholders' interests. That was part of this. Because Mr. Atkinson, just like the others, he had a duty to tell the truth. Not to parse words, but to tell the truth about what this payment was for.

MR. SCHACHTER: Your Honor, objection. Instructions **[13278]** about duty of loyalty should come from the Court, not from Ms. Ruder. Ms. Ruder is misstating the law.

THE COURT: Ladies and gentlemen, when I instruct you on the law at the end of the case, I will instruct you about the duty of loyalty. And that is the law that you must follow.

BY MS. RUDER:

The crime in this case is not about the fact that defendants got money. It's not that by itself. The crime in this case is that the defendants hid and lied about the true reasons why they got money.

The SEC disclosures in this case, that's why they're relevant. It's because when you look at those disclosures, you see the defendants hiding from the shareholders, lying to the shareholders about the true reasons why this money was getting paid to them -- getting paid to the top four executives -- instead of staying with the company. This is what it's about, ladies and gentlemen.

The same thing happens in the U.S. Community disclosures. Feet to the fire. Disclosures made. It says, "In connection with the sales of United States newspaper properties." It says, "To satisfy a closing condition." It says there were non-competes. It's not true.

The particular dollar amount that we're talking about here is $15.6 million. where does that come from? **[13729]**

This is what it comes from (indicating). And you've heard the witnesses testify about this: Nine-and-a-half million was for the CNHI II transaction; five-and-a-half for APC; and, 600,000 for Forum and Paxton.

9.5 million for the executives in CNHI II was not a condition of closing. There's not even a contract they can point to to say that. Because nine-and-a-half million isn't anywhere. That's false.

APC, that's not a newspaper transaction. There are no conditions of closing. There are no Non-Compete Agreements with buyers. That's false, too.

And let me pause on the 5.5 for a second because you have heard some testimony in this case and heard suggestions by counsel that what this $5.5 million was really about was unpaid management fees from Hollinger International to the executives at Ravelston.

And you heard absolutely, as a matter of fact, from Fred Creasey that that's not what it was. It was not -- the 5.5 was not -- part of management fees.

But the reason I'm bringing it up now is even if any of these defendants truly believed this was part of management fees, then what are they doing

lying about it when you get these disclosures? They say it's part of newspaper transactions, condition of closing, all this nonsense. If they really believed this was legitimate money -- legitimate **[13730]** money that they received for legitimate purposes -- there wouldn't be a reason to lie to the shareholders of the company about what it was really about.

And that's just what happened.

Forum and Paxton, again, it's easy. The disclosure says that these guys signed non-competes with the buyers. They didn't. That didn't happen here. This wasn't part of condition of closing those transactions.

So, the disclosure is completely false.

The disclosure is also false because it says, "The independent directors approved the terms of the payments." That's not true, either. The independent directors -- in particular, the Audit Committee -- wasn't told anything about the terms of the CNHI II, APC and Forum and Paxton payments. They testified -- all three of them: Mr. Burt, Ms. Kravis and Governor Thompson -- unequivocally, unequivocally, that they did not know about these payments and they didn't approve them.

And they are corroborated on the documents.

Again, I point you to all the binders that you've seen in this courtroom. There's not a shred of paper that shows you that this Audit Committee was told anything about these payments at the time that they were happening. There's nothing.

And, in fact, the paper that you have seen shows you **[13731]** the opposite. You've seen the Executive Committee consents, where they were

going around the Audit committee on Forum and Paxton and CNHI II.

You've even seen this, ladies and gentlemen (indicating). On the left-hand side of the screen is Government Exhibit CanWest 28. It's the memo that Mr. Kipnis sent to the Audit committee on the CanWest non-compete payments. It's dated September 1 of 2000.

On the right-hand side of the screen, it's Government Exhibit Audit 10. It's a memo Mr. Kipnis wrote to the Audit Committee regarding the Osprey non-compete payments in February, '01.

The Osprey non-compete payments aren't part of the charges in this case; but, what's significant here is you've got Mr. Kipnis squarely presenting the Audit Committee with information on the CanWest non-compete payments and the Osprey non-compete payments. It's right there in a memo.

The first paragraph says -- the first paragraph of both memos -- "Black, Radler, Atkinson and Boultbee," and then there are some other parties listed on the CanWest memo, "were each requested to execute Non-Competition Agreements." He's telling him about that.

You have not seen any memos like this on CNHI II. Mr. Kipnis didn't write to the Audit committee about that transaction. There's no memo on APC. There's no memo on **[13732]** Forum and Paxton with Mr. Kipnis saying, "These guys have each been requested to execute non-competes. Here's how much they're going to get."

Governor Thompson -- let me step back for a second.

If we go back to the disclosure -- all right. So what I've told you -- what I've argued to you -- is the Audit Committee didn't know anything about this. So, what did he with make of this? What do we make of this language, "The company's independent directors have approved the terms of the payments"?

Because, as you know, all three of the Audit Committee members, they signed off on it. Their signature -- typed signature -- was on the disclosures. What do we make of that?

Mr. Greenspan made it very clear exactly what he wanted you to make of that. He came right out and accused the Audit Committee members of perjury. He accused them of lying in their testimony to you in this trial.

Governor Thompson testified, "We never approved non-compete payments to individuals for the U.S. Community transaction. They were never presented to us."

Mr. Black's counsel said, "I'm going to suggest to you, Governor Thompson, that you all read these things; you approved all of these things; you thought they were right; and, when there was some criticism, all of the three of you **[13733]** conveniently forgot."

Answer: "That is false."

He is accusing them all of perjury; of getting together and manufacturing a story; getting on the same page and coming in here, each of them -- Mr. Burt, Ms. Kravis and Governor Thompson -- and lying to you.

There is nothing, no evidence, nothing at all to support Mr. Greenspan's allegation. Nothing at all. You are the judges of each witness' credibility. It's

going to be up to you to decide whether you believe their testimony.

And you've heard them testify about their service on various boards; about what they did for Hollinger International; and, you've also heard them testify about what they didn't do for Hollinger International; about how they missed it in these disclosures; how they failed to read them as carefully as they should have.

And, ladies and gentlemen, let me be as clear as I can about the Audit Committee in this case. Because there has been some suggestion that they failed the shareholders. Let me be clear.

The Audit committee of Hollinger International, they did fail the shareholders. They did. They should have read these things word for word, sentence by sentence, paragraph by paragraph. They should have read everything in them. And when they didn't do that, they did fail the shareholders. **[13734]** That's not what they were supposed to do.

But the biggest failing of the Audit Committee, the biggest failing of Governor Thompson -- and the same thing is true for Mr. Burt and Ms. Kravis -- is that they trusted these guys (indicating) way too much. They trusted these defendants to be honest with them; to be performing these fiduciary duties that each one of the officers had. And by trusting these defendants so much, the defendants were able to steal from the company.

* * *

[13743]

We also have to show intent to defraud. These things were done knowingly with the intent to deceive and cheat Hollinger International and its public shareholders.

And there are two parts of this. First, it's that theft of money and property causing a gain of money or property to the defendants or others, or the potential loss of money or property to another, or depriving the corporation of and its public shareholders of their right of the honest services of the corporate officers.

Intent to defraud can be either one or it can be both.

We are pursuing both theories, ladies and gentlemen. Both of them in this case.

With that, let's talk about Conrad Black.

* * *

APPENDIX M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 471 – Feb. 16, 2007]

UNITED STATES OF AMERICA,	)	
vs.	)	No. 05 CR 727-01 Hon. Amy J. St. Eve
CONRAD M. BLACK, *et al.*	)	

DEFENDANT'S JOINT
PROPOSED JURY INSTRUCTIONS

Defendants Conrad M. Black, John A. Boultbee, Peter Y. Atkinson and Mark S. Kipnis, through their respective attorneys, hereby submit their joint proposed jury instructions.

As set forth in Defendants' Memorandum Of Law Concerning Jury Instructions For Honest Services Fraud Predicated On Violations Of Delaware Corporate Law, filed contemporaneously herewith, Defendants respectfully submit that for purposes of the Court's consideration of the jury instructions before the start of trial, the instructions pertinent to Delaware corporate law (Government Proposed

Instructions 18-37 and Defendant's Proposed Instructions 18/19-A through 37-B) are especially important.

The government has alleged the defendants deprived Hollinger International of their honest services by breaching the fiduciary duty of loyalty owed under Delaware corporate law. Accordingly, the scope of that duty under Delaware law is of critical importance. The government, in both the Superseding Information and its proposed jury instructions, has misstated Delaware law, and if the government is permitted to argue that the Defendants breached duties they never owed in the first place, then the jury could convict on a legal theory not recognized by the Delaware courts.

* * *

[16] DEFENDANTS' INSTRUCTION NO. 21

Issues – Scheme To Deprive Of Honest Services

The first element of a mail or wire fraud charge is the existence of a scheme. Among the schemes the government alleges is one to deprive Hollinger International of the defendants' honest services. To prove this scheme, the government must prove all of the following beyond a reasonable doubt with respect to each defendant:

First, that the defendant knowingly engaged in a scheme to deprive Hollinger International and its shareholders of their right to the defendant's honest services;

Second, that through such scheme, the defendant intentionally breached his fiduciary duty for personal gain for himself [or another], and in order to achieve a corrupt purpose; and

Third, that in doing so, the defendant intended to defraud the corporation and its shareholders.

If you find that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the particular defendant not guilty of a scheme to deprive Hollinger International of his honest services.

A breach of a fiduciary duty owed by an officer, director or controlling shareholder under Delaware law does not, by itself, constitute a scheme to defraud. That is to say, even if you find beyond a reasonable doubt that an officer, director, or controlling shareholder knowingly breached or knowingly schemed to breach his or her fiduciary duty, that breach is not enough.

If you find that each element is present but also find that the defendant reasonably believed that his actions accomplished an important company objective, then he cannot be convicted, because by pursuing his employer's objective, he had the reasonable belief that he was not depriving it of his honest services. **[17]**

As I have further instructed you, proof of a scheme is not proof of mail or wire fraud. In addition to proving a scheme, the government must prove the other elements of mail or wire fraud beyond a reasonable doubt.

Authority:

United States v. Bloom, 149 F.3d 649, 654-57 (7th Cir. 1998) (to commit honest services fraud, defendant must receive personal gain; gain to others is not enough). Defendants recognize that the Court ruled on this issue previously, but seek to preserve the issue by offering the instruction proposed above,

without the bracketed text. Assuming the Court refuses to give an instruction excluding the bracketed text, Defendants respectfully submit that the above instruction (rather than the government's proposed instruction) should be given with the bracketed text included.

United States v. Hausmann, 345 F.3d 952, 959 (7th Cir. 2003) (same)

United States v. Brown, 459 F.3d 509, 522 (5th Cir. 2006)

United States v. Skilling, H-04-025-02, 2006 WL 3030721, *3 (S.D. Tex. Oct. 23, 2006)

* * *

[29] DEFENDANTS' INSTRUCTION NO. 34-A

In order to prove a scheme to defraud, the government must prove that it was reasonably foreseeable to the defendant that the scheme could result in some economic harm to the victim.

Authority:

United States v. Vinyard, 266 F.3d 320, 327-28 (4th Cir. 2000)

United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000)

United States v. deVetger, 198 F.3d 1324, 1329-30 (11th Cir. 1999)

United States v. Sun Diamond Growers, 138 F.3d 961, (D.C. Cir. 1998)

United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997)

APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 473 – Feb. 16, 2007]

UNITED STATES OF AMERICA,	)	
	)	No. 05 CR 727
vs.	)	
	)	Hon. Amy J. St. Eve
CONRAD M. BLACK, *et al.*	)	

DEFENDANT'S JOINT OBJECTIONS TO THE GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

Defendants Conrad M. Black, John A. Boultbee, Peter Y. Atkinson and Mark S. Kipnis, through their respective attorneys, hereby submit their joint objections to the government's proposed jury instructions.

For the Court's ease of reference, this document includes the full text of each proposed government instruction and the authority cited by the government in support. Immediately following the authority is the text of Defendants' joint objections to that proposed government instruction, beginning with a statement specifying whether: (a) the Defendants agree that an instruction should be given

on that topic, but object to the form proposed by the government; or (b) object to any instruction being given on that topic. Where Defendants do not object to a particular instruction, the text of the proposed government instruction is omitted entirely. Defendants have included a table of contents that lists the Defendants' objections to the government's proposed instructions.

In submitting these objections prior to trial, Defendants reserve their right to add to or refine such objections depending on the course of the trial. [2]

TABLE OF CONTENTS

Proposed Government Instruction	No Objection	Objection	Defendants' Counterproposal (if appropriate
1	X		
2		X	2-A
3	X		
4	X		
5	X		
6	X		
7	X		
8	X		
9		X	9-A
10		X	10-A
11	X		
12		X	12-A
13	X		
14	X		
15		X	15-A
16		X	16-A
17	X		
18		X	18/19-A
19		X	18/19-A

20		X	20-A
21		X	
22		X	
23		X	25-A
24		X	
25		X	25-A
26		X	26-A
27		X	27-A
28		X	
29		X	
30		X	30-A
31		X	
32		X	
33		X	
34		X	34-A
35		X	
36		X	
37		X	37-A
38	X		
39		X	[3]
40	X		
41		X	41-A
42		X	
43		X	43-A
44		X	44-A
45		X	45-A
46		X	46-A
47		X	47-A
48		X	
49		X	49-A
50		X	50-A
51		X	51-A
52	X		
53		X	
54	X		
55	X		

56	X		
57		X	57-A
58	X		
59	X		
60	X		
61		X	
62	X		
63		X	63-A
64		X	
65		X	
66	X		
67		X	67-A
68		X	
69		X	
70		X	
71		X	
72	X		
73	X		
74		X	74-A
75		X	

* * *

[37] GOVERNMENT INSTRUCTION NO. 33

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrue to others, so long as the government has proved the other elements of mail or wire fraud beyond a reasonable doubt.

A corporation and its public shareholders may be deprived of its corporate officers' honest services no matter who receives the benefits of the fraud, so long as the government has proved the other elements of mail or wire fraud beyond a reasonable doubt.

Authority:

United States v. Spano, 421 F.3d 599, 602-03 (7th Cir. 2005)

United States v. Lombardo, 865 F.2d 155, 159 (7th Cir. 1989)

United States v. Warner, 02 CR 506 (Pallmeyer, J.)

United States v. Sorich, 05 CR 644 (Coar, J.) (modified)

OBJECTION

Defendants object to Proposed Government Instruction No. 33 on several grounds. It should not be given.

First, this non-pattern instruction is redundant of the "loss" pattern instruction. The "loss" instruction provides that "[t]he mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime or financial gain to the defendants." The government seeks, by this proposed instruction, to add statements that "A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrue to others," and that a corporation may be deprived of honest services "no matter who receives the benefits of the fraud." These statements are redundant and unnecessary. *See Matthews v. Commonwealth Edison Co.*, 93 C 4140, 1995 WL 478820 at *3 (N.D. Ill. 1995) (striking proposed jury instructions as redundant).

Second, Defendants object to this instruction on the basis that it is misleading. The statement in the second paragraph, that a corporation and its public shareholders may be deprived of the corporate officers' honest services "no matter who receives the benefits of the fraud," is misleading in that it implies

that a conviction for honest services fraud would be appropriate even if the corporation itself was a beneficiary of the fraud, a proposition that was soundly rejected in *United States v. Brown*, 459 F.3d 509, 522 (5th Cir. 2006). *See also United States v. Skilling*, H-04-025-02, 2006 WL 3030721, *3 (S.D. Tex. Oct. 23, 2006). **[38]**

GOVERNMENT INSTRUCTION NO. 34

In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable financial harm to the victims of the scheme.

Authority:

United States v. Hausmann, 345 F.3d 952, 959 (7th Cir. 2003)

United States v. Fernandez, 282 F.3d 500, 506-07 (7th Cir. 2002)

United States v. Segal, 02 CR 112 (Castillo, J.)

United States v. Warner, 02 CR 506 (Pallmeyer, J.)

OBJECTION

Defendants object to Proposed Government Instruction No. 34 on several grounds. It should not be given in this form. Instead, **Defendants' Proposed Instruction No. 34-A** should be given.

Defendants incorporate their objections to Proposed Government Instruction No. 33 as and for his objections to Proposed Government Instruction No. 34. Instructions that inform the jury of facts the government does ***not*** have to prove are unnecessary, unfairly prejudicial, and serve only to lengthen the instructions unproductively.

In construing the honest services statute, the Seventh Circuit has not adopted a "foreseeable harm" type test. *See United States v. Leahy*, 469 F.3d 773, 787 (7th Cir. 2006); *United States v. Henningsen*, 387 F.3d 585, 590 (7th Cir. 2004); *United States v. Hausmann*, 345 F.3d 952, 959 (7th Cir. 2003). But this does not mean the concept need be given to the jury in the form of a jury instruction. *See Byrd v. Illinois Department of Public Health*, 423 F.3d 696, 711 (7th Cir. 2005).

Indeed, the government's proposed instruction is neither derivative from statutory language nor a pattern instruction. It does not affirmatively define an essential element, but rather informs the jury what the government need not prove. Such an instruction is unnecessary, and only invites jury confusion over a non-issue.

Moreover, the circuits are split on this issue of whether the mail fraud statutes include a "reasonably foreseeable harm" test. *See United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (*en banc*) (discussing approaches). Cases employing such a test include: *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2000); *United States v. Martin*, 228 F.3d 1, 17 (1st Cir. 2000); *United States v. deVetger*, 198 F.3d 1324, 1329-30 (11th Cir. 1999); *United States v. Sun Diamond Growers*, 138 F.3d 961, (D.C. Cir. 1998); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997). The Supreme Court has not resolved to the conflict. If the *Vinyard* formulation correctly states the law, it would be error to give the government's proposed instruction.

APPENDIX O

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 743 – June 12, 2007]

UNITED STATES OF AMERICA, Plaintiff, vs. CONRAD M. BLACK, *et al.* Defendants.	No. 05 CR 727-01 Honorable Amy J. St. Eve

DEFENDANT BLACK'S RESPONSE TO GOVERNMENT'S REVISED JURY INSTRUCTIONS AND REPLY TO GOVERNMENT'S RESPONSE TO SUPPLEMENTAL JURY INSTRUCTIONS WITH RESPECT TO COUNTS 10-12

Defendant CONRAD BLACK, by his attorneys, respectfully responds to the Government's Revised Jury Instructions and replies to the Government's Response to his Supplemental Instructions with

respect to Counts 10-12. In support thereof, the following is offered:

I.

PROPOSED AMENDMENTS TO
GOVERNMENT'S REVISED INSTRUCTIONS

Defendant's Revised Instruction 9-A: In proposed verdict forms, Count 14 is referred to as "interference with an official proceeding." This is a more accurate description of the offense charged in Count 14. *See* 18 U.S.C. § 1512(c) (1). Mr. Black moves to substitute the words "interference with an official proceeding" for **[2]** "evidence tampering." *See also* Government's Revised Instructions, p. 32; Government's Revised Instruction 46.[1]

Government Instruction 13: This is the "other crimes" instruction. Fed.R.Evid. 404(b). The Committee Comments to Instruction § 3.04 state that the judge may neutrally describe the "other crimes" evidence for purposes of clarity. Because this has been a long trial, Mr. Black requests that the instruction be amended to include reference to the "other crimes" evidence, *i.e.*, the Yahoo! message board posting.

Court's Revised Instruction 20: If the Court determines that a unanimity requirement applies to

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[1] This instruction presently skips over Count 13, which was dismissed, and does not change the numbering of the counts. A decision must be made as to whether counts will be renumbered, or left as is with an explanation that Count 13 is no longer part of the case. If counts are renumbered remaining instructions and the verdict forms must correspond.

the mail/wire fraud theories, then Mr. Black moves the Court to give the unanimity language set forth in the instruction in the Defendants' Position Paper Regarding Special Verdicts.

Government Revised Instruction 32: The Fifth Circuit recently issued *United States v. Ratcliff*, 2007 WL 156084 (May 31, 2007), which acknowledged that a mail/wire fraud scheme need not actually cause financial harm to the victim, but went on to say that the scheme, if successful, must wrong the victim's property rights in some way.

Mr. Black moves for two amendments to Government's Revised Instruction 32: **[3]**

First, that the word "victim" in the first sentence be preceded by the word "alleged."

Second, that the following sentence be appended to the instruction:

> "However, the scheme, if successful, must wrong the alleged victim's property rights in some way."

Black's Revised Instruction 49: In view of Monique Delorme's testimony and the cross-examination of Joan Maida, Mr. Black requests that "corporate policies" be added to the list of what does not constitute an "official proceeding." Mr. Black proposes that the second paragraph of Black's Revised Instruction 49 read as follows:

> Canadian court proceedings, an investigation by the United States Attorneys Office and internal corporate policies do not constitute "official proceedings."

II.

REPLY TO GOVERNMENT'S RESPONSE TO SUPPLEMENTAL JURY INSTRUCTIONS WITH RESPECT TO COUNTS 10-12

The government does not argue that Defendant Black's proposed supplemental instruction based on the SEC regulation discussed in *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007), inaccurately states the SEC regulation, 17 CFR 229.402(b) (2) (iii) (C) (1). Nor does the government contend that Hollinger International's SEC proxy filings are unconnected to the scheme alleged in Count Ten. Rather, the government reads the proposed instruction as if it directs a finding of not guilty. But that is not what the proposed instruction does. To the contrary, the proposed instruction merely informs the jury of SEC regulation **[4]** governing the disclosure of perquisites in proxy statements. Those regulations appear nowhere else in the jury instructions, and are integral to the defense.

It is well-established that a defendant is entitled to a jury instruction on his theory of the defense so long as it has some foundation in the evidence, no matter how tenuous. *E.g.*, *United States v. Douglas*, 818 F.2d 1317, 1319 (7th Cir. 1987). A four-part test has been established for determining whether a defense theory instruction should be given. The proposed instruction must: 1) accurately state the law; 2) be supported by evidence; 3) not already be part of the charge; and 4) its omission would deprive the right to a fair trial. *Id.*; *see also United States v. Pedigo*, 12 F.3d 618, 626 (7th Cir. 1993).

This test has been satisfied with respect to Mr. Black's supplemental instruction. First, the instruction is an accurate statement of the law. The

government does not contend that the instruction incorrectly quotes or paraphrases the SEC regulation governing the disclosure of perquisites.[2]

The government's reliance on *United States v. Green*, 786 F.2d 247, 249-51 (7th Cir. 1986), is misplaced insofar as jury instructions are concerned. Stating the obvious, *Green* did not address SEC disclosure regulations. Rather, *Green* found that a mailing required by law *could* be the basis for a mail fraud conviction -- even if the required mailing was not itself false or fraudulent. *Cf. Parr v. United States*, 363 U.S. 370 (1960). Mr. Black's instruction does not address this issue. It is not a **[5]** *Parr* instruction. That is, the proposed instruction does not state, "You must acquit the defendant if you find the charged mailing was required by law and does not contain any false or fraudulent statements."

The conflict between *Green* and *Lake* has no bearing in regard to jury instructions. In the context of an evidentiary sufficiency challenge to the evidence, *Lake* held that the government had failed to prove that there was anything false or fraudulent in the SEC proxy reports forming the basis for wire fraud convictions.[3] 472 F.3d at 1255. Absent false statements in the SEC filings, *Lake* was unable to

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[2] Mr. Black has submitted two versions of the instruction. One attempts to paraphrase the SEC regulation and *Lake*; the other essentially quotes the regulation and *Lake*.

[3] *Lake* also suggested that the district court's refusal of defense instructions concerning the SEC regulation was error, but reversed outright on the greater issue of evidentiary insufficiency.

conclude that the charged wirings were for the purpose of executing the wire fraud scheme. Lake acknowledged that its interpretation of *Parr* was consistent with the majority of the circuits, but different from the majority opinion in *Green*. While Lake articulated that Judge Posner's dissent in *Green* had the better argument, it later commented that, even if it adopted the less restrictive interpretation of *Parr*, it could not conclude that the wirings furthered the charged scheme. *Id.* at 1260.

Second, the instruction has foundation in the evidence. With respect to the 2001 proxy there is no dispute Hollinger International's payment for the party was under the lesser of $50,000, or 10% of Mr. Black's reported salary. With respect to the 2002 proxy, not only did the government fail to prove International's actual incremental cost for airplane trip to Bora Bora , but defense witness Lee Williams testified that the variable (incremental) cost of the trip was less than the reporting threshold. **[6]**

Against this, the government argues that the proxy disclosures regarding Mr. Black's exercise of the option on the New York Apartment dictate that the proposed instruction not be given. Mr. Black's exercise of the option occurred in 2000, and was disclosed in the International's 2001 and 2002 proxies. The government's theory is that the proxy failed to accurately describe the option transaction. An argument, however, can be made that the description is literally true. In all events, it is up to the jury to determine whether disclosures relating to the option were part of the charged fraud scheme. *E.g.*, *United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990) (reversing for failure to give an instruction, and noting that " [s] uch questions must

be resolved by the jury – not the court"); *see also United States v. Meyer*, 157 F.3d 1067, 1074-75 (7th Cir. 1998). If the jury concludes that the exercise of the apartment option was not part of the charged fraud scheme, then the jury would be left to consider reporting requirements vis-a-vis the party. As *Lake* makes clear, the SEC reporting requirements for perquisites are relevant to the defendant's intent, and whether the wirings furthered the scheme to defraud.

Here, by the proposed instruction, Mr. Black is not asking the Court to find as a matter of law that the charged wirings did not further the scheme. Rather, Mr. Black merely requests that the jury be given objectively correct legal guidance on SEC reporting requirements.

Third, there can be no doubt that the SEC regulations concerning perquisites are not found elsewhere in the instructions. The government does not contend otherwise. It is important that the jury be given instructions on difficult legal [7] concepts. *See United States v. Gee*, 226 F.3d 995, 895 (7th Cir. 2000).

Finally, failure to give the instruction would result in the denial of Mr. Black's right to a fair trial on Counts 10-12. As stated in *Walters*, "instructions are the jury's only compass." 913 F.2d at 392. Given that the filing of allegedly false proxy statements are an essential part of the scheme charged in Counts 10-12, it is equally important that the jury be given an objective synopsis of the relevant legal standards relating to the disclosure of perquisites in proxy statements. *See Lake*, 472 F.3d 1247.

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, et al.,	)	Chicago, Illinois
	)	March 12, 2007
Defendants.	)	10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS – JURY INSTRUCTION CONFERENCE
BEFORE THE HONORABLE AMY J. ST. EVE

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
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[83] MR. SISKEL: My understanding, Judge, was that defendants' counsel was preserving the issue,

that was the subject of pretrial motions, about whether it could be a gain to another --

MR. SAFER: That's right.

MR. SISKEL: -- and that --

MR. SAFER: That's right.

MR. SISKEL: -- assuming that that stands, there is no objection with the language here; and, that the primary issue was whether this should be a stand-alone or part of the elements instruction.

MR. SAFER: Exactly right, your Honor. This was just a preservation of the issue.

THE COURT: Okay.

Your prior objection will be preserved, then, and I will give Government's 29.

Government's 30, the objection is to including Hollinger International and its public shareholders as the victim.

I will overrule that and leave that language in.

Your objection -- you object that it misstates the law. Well, this tracks the pattern. **[84]**

MR. SAFER: This, I think, your Honor, is the gain of one -- this is -- this is theirs.

MR. YUROWITZ: The issue raised by United States vs. Walters, your Honor.

THE COURT: This is your "intent"?

MR. YUROWITZ: Yes.

This is whether it's enough to either obtain or to deprive. Our position is that it's not enough to have one or the other, you need both; and, United

States vs. Walters, your Honor, directly supports that.

MR. SISKEL: As we said when this came up in the "scheme to defraud" instruction, the pattern uses "or" even after Walters, but we're fine with changing it to an "and," given that -- the proof in this case, and that it should include "potential loss" and it should include "a gain to others," not simply to the defendant, himself.

THE COURT: Okay.

Include the "and," then --

MR. YUROWITZ: The other issue --

THE COURT: under Walters.

The other issue is the intent.

MR. YUROWITZ: Right.

THE COURT: I am going to overrule that objection for the reasons set forth in the pattern, that the Seventh Circuit has addressed at length. **[85]**

Government 31, I am going to take this under advisement.

Government 32, I will give. The defendants' objection is preserved. I addressed this already.

Government 33, I am overruling your "redundant" objection because I do not think this is redundant of the "loss" instruction.

Your second objection, you are arguing that it is misleading.

Mr. Safer, is this your objection or --

MR. SAFER: I don't think so.

THE COURT: Who wants to address this for the defendants?

Essentially, no matter who receives the benefit of the fraud.

MR. SAFER: The issue, your Honor, is whether, again, sort of, the absolute statement in the second paragraph. That is, under United States vs. Brown, the Court held that if the defendant believed -- reasonably believed, I think -- believed that he was advancing the company's cause, then he is not guilty of the honest services fraud.

We have that in this -- in 21. So that we say, "If you find that the defendant did intentionally breach his or her fiduciary duty, but that the defendant reasonably believed that his actions accomplished an important company objective, [**86**] then he cannot be convicted because by pursuing his employer's objectives, he had the reasonable belief that he was not depriving it of his honest services."

So, that's why we think that the second paragraph here contradicts that.

THE COURT: Mr. Siskel?

MR. SISKEL: Well, to address it, sort of, in both contexts, the Fifth Circuit in the Brown case even recognized that those were exceptional circumstances different from your run-of-the-mill even "honest services" fraud case.

The exceptional circumstances in Brown, one of the Enron cases, was this notion that by inflating the quarterly figures of the corporation, the defendants both benefitted themselves, in the sense of upping their bonuses, and benefitted the corporation, in the sense of keeping its stock price

propped up. That was an exceptional circumstance there.

I don't think there is any valid concern here that the jury will be misled into thinking that the government's allegations, where defendants are taking millions of dollars away from the shareholders of the company in the form of bogus non-competition agreements, somehow benefitted the company.

So, I think that -- and that language in Defendants' Proposed 21 just sitting there because of some exceptional circumstances in a case that has nothing to do with this one, I think, does give the misleading impression that something [87] like the business judgment rule and its presumption would apply here.

So, that's the problem, I think, with putting it in in 20- -- Defendants' Proposed 21. I think it's unnecessary because Brown doesn't dictate it under the circumstances of this case; and, it's not only unnecessary, but would be misleading to the jury.

And, then, I think it's just -- in terms of Government Proposed Instruction 33, you know, while we would consider softening the language, I just don't think it's a realistic concern that the jury is going to somehow think, you know, this is a situation where a defendant's fraud would help the company.

MR. SAFER: Your Honor --

THE COURT: Did you say Mr. Safer "Graham"? I thought you said "Graham." I know you have cited Brown in your objections.

MR. SAFER: Brown.

THE COURT: Okay.

MR. SAFER: Brown.

Sorry.

Your Honor, that all presupposes that the jury is going to find these are bogus non-competes and that there's fraud. That's not the point.

The point of this is that it could -- the jury could **[88]** -- very well could -- find that the taking or acceptance of payment for a non-competition agreement, if it serves the corporation's benefit ultimately, is something that is – does not deprive the company of its honest services, even if some of the defendants got a lot of money from that.

MR. SUSSMAN: I just don't -- I don't -- think that the Brown case supports the notion that the defendant can enrich himself via fraud even if he believes that it won't harm the corporation in the long run, which is, I think, more what Mr. Safer's arguing than that these non-competes in some way actually benefitted the corporation.

THE COURT: Okay.

34.

MR. YUROWITZ: We would certainly strongly object to Government's 34. Once again, I think Walters directly supports it. They say a deprivation is a necessary element. And we propose a counter-proposal which, we think, adequately states the law.

MR. SISKEL: Judge, my understanding --

THE COURT: I thought Fernandez -- while this might be an accurate statement of the law, I thought Fernandez -- rejected the argument that the jury instructions should have included something along these lines.

MR. SISKEL: Well, let me just say, Judge, my understanding was that I thought the defendants agreed this **[89]** was an accurate statement of the law, that we don't have to show foreseeable harm. There is authority in other circuits to the contrary.

We are willing to withdraw this instruction, assuming that defendants' proposed instruction is not given; and, that, you know, we reserve the right, if there is argument to suggest that foreseeability is an element, to instruct the jury appropriately that it isn't.

THE COURT: I will allow you to withdraw this instruction.

Although I do think it is an accurate statement of the law, I think Fernandez, as I said a moment ago -- and Hausmann subsequent to that -- reject that it should be an instruction.

* * *

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 1, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FORTY-EIGHT
TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE AMY J. ST. EVE

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[11680] * * *

THE COURT: Okay. Is, Mr. Martin or anybody else, other than the last line which we've talked about, is there any objection to anything else in the third paragraph of Court Instruction 20?

MR. GREENBERG: Yes, your Honor. I don't --

MR. MARTIN: No.

MR. GREENBERG: I don't have a case to cite in support of it. I doubt I'll find one, but --

THE COURT: It's never a good way to start an argument.

(Laughter.)

MR. GREENBERG: Well, there's been a number of cases **[11681]** in which the Supreme Court, despite unanimity of the circuits has reversed -- McNally -- and honest services could very well be fruitful area for that.

I think what distinguishes breach of fiduciary duty for private gain, which, of course, private gain occurs in virtually every breach of fiduciary case. What distinguishes a civil case from a criminal case is the word "corruptly." I believe the word "corruptly" should be in there.

We proposed it in our own requested instruction on this. It's not there now. I know the government opposes it. But I think -- I think the circuits are showing a lot of uncertainty about this honest services, and I know you're bound by law as it is, but corruptly is what -- is at least a word that would capture the distinction between breach of fiduciary duty as a civil wrong -- for personal gain as

a civil wrong and breach of fiduciary duty for personal gain as a crime.

THE COURT: Your objection is overruled. For one, the law does not support that. "Corruptly" is nowhere in the statute or in any case I've ever seen, and I think I have now read every honest services case in the 7th Circuit at least five times, and I have never seen the word corruptly there. And corruptly really goes to the state of mind, and that's the second element of mail and wire fraud, which is intent to defraud. **[11682]**

So your objection is overruled.

Any other objections to the third paragraph of Court Instruction 20?

MR. SCHACHTER: We join in Mr. Greenberg's objection. Not to that --

THE COURT: Mr. Cramer's objection? Mr. Greenberg's objection.

MR. SCHACHTER: Mr. Greenberg's.

THE COURT: The corruptly?

MR. SCHACHTER: The corruptly. I have nothing else to add.

THE COURT: Okay.

MR. SCHACHTER: We note that your Honor took out the portion as it relates to the 5th Circuit's decision in the United States versus Brown relating to corporate objectives. Anyway, I just renew the request that the Court put that in there consistent with the 5th Circuit's decision.

THE COURT: Where--

MR. SCHACHTER: There was language --

THE COURT: Where was that language from?

MR. SCHACHTER: It was from defendants' proposed 20A.

THE COURT: Okay, bear with me a second. If it deals with the fiduciary duty part, I have not revised that yet. Bear with me.

MR. SCHACHTER: Oh, it may then, your Honor. **[11683]**

THE COURT: I think it does. But bear with me a second, please.

Joe, do you have the defendants' revised instructions that were submitted?

MR. SCHACHTER: Your Honor, I can hand --

THE COURT: Would you, please?

MR. SCHACHTER: It sounds like Mr. Siskel is telling me, and I'm sure he's right, that this is subsumed within the Court's consideration of fiduciary duties issue.

THE COURT: I think it is, which I -- yes, it is, and I --

MR. SISKEL: Your Honor, the government addressed some of it in our filing on the assumption that that was separate from this proposed court's instruction.

THE COURT: And it is separate, so you -- I have not ruled on that yet.

Other than the last sentence and the issue of above-board channels, any other objections to the third paragraph?

And you have not addressed yet the second-to-last line. I put language in brackets. The

government's language was "or another." I changed it to "and/or a co-schemer."

This is the sentence that reads, "In order to deprive Hollinger International and its public shareholders of their intangible right to defendants' honest services, the **[11684]** government must prove that the particular defendant you are considering misused his position for private gain for himself and/or" -- defendants had "or another." I think "or a co-schemer" is probably more accurate based on the language in Blum and Spano, which I don't know if you have a preference.

MR. MARTIN: Your Honor, our preference is just to co-schemer, period.

THE COURT: It's an either/or, it's either a co-schemer or another.

MR. SAFER: Yeah, I think it clearly is a co-schemer because in Thompson another certainly got a benefit.

THE COURT: Exactly. Exactly. I think that's more accurate, but I --

MR. SCHACHTER: We agree, your Honor.

THE COURT: Okay.

MR. GREENBERG: Your Honor, just in case -- again, I don't want to be heard to -- understood to acquiesce because we did move in regard to after Thompson was decided and argued in that submission that it should be private gain to the defendant himself and not to the other. I'm assuming you are overruling that.

THE COURT: I am overruling that. We addressed that during court one day this week, U.S.

versus Spano, the 7th Circuit case, which was I think two years before Thompson is still good law, and I do not believe under 7th Circuit law and **[11685]** under Thompson, which had very unique facts, but I don't believe under that that they changed the law in Spano. The private gain can still be for the individual or a co-schemer.

Okay. With that, the only outstanding issue then, and I just do want to look at Thompson one more time, is whether or not the "above-board channels" should stay in the last sentence. I'm revising this. I will have this e-mailed to you

MR. SISKEL: Okay. Thank you.

THE COURT: -- the revised instruction so that you can incorporate that into --

MR. MARTIN: And, your Honor, just so the record's clear, and I'm sure it is. I mean we're working with the Court and the parties agreeing to the form, but we've had problems with honest services in principle from the beginning, and I don't want to waive any of that.

THE COURT: You are not waiving your problems or your issues with the private gain or the issue you raised about Delaware law being part of honest services.

MR. MARTIN: Thank you.

THE COURT: Okay. I will give Court 20 then instead of Government 20 or Defendant 20A for the scheme. This also incorporates the new Government 19 and new Government 21.

Oh, no, it does not include 21. Let's talk about Government 21, Revised Instruction 21.

* * *

APPENDIX R

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 13, 2007 10:00 o'clock a.m.
Defendants.	)	

VOLUME FIFTY-SIX
TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

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[13476] THE COURT: * * *

I have reviewed Mr. Boultbee's proposed Instruction 20 and the need for unanimity as to the

particular false pretense, representation or promise. I am sustaining the government's objection to that. I will not give that **[13477]** instruction because I don't think it's an accurate statement of the law. For the following reasons, I am going to follow the pattern instruction:

I don't think it's -- under the law, you do not need to have unanimity on what particular misrepresentations were made, as long as the jury is unanimous that the defendant engaged in a scheme to defraud. U.S. versus Lyons, the 7th -- the 9th Circuit case I gave you the other day at 472 F.3d 1055, 1068 rejected this precise argument.

The 2nd Circuit has effectively reached the same decision in U.S. versus Shaoul, S-H-A-O-U-L, 41 F.3d 811 at 817. And although the 7th circuit has not addressed this precise issue based on its cases regarding the unanimity requirement with respect to the scheme, such as U.S. versus Fawley F-A-W-L-E-Y, 137 F.3d 458 at 471, a 1998 case, and U.S. versus Davis, 471 F.3d 783 at 790, a 2006 case, I believe they would come out the same way.

Your reliance on U.S. versus Fawley, 130 -- I'm sorry, I cited the wrong one. I am not relying on U.S. versus Fawley. You were relying on U.S. versus Fawley at 137 F.3d 458 at 471. I am relying on U.S. versus Davis.

Your reliance on Fawley, I believe, is misplaced. In Fawley, the 7th Circuit addressed the false -- a false statement to the grand jury, an 18 U.S.C. section 1623 case. The unanimity issue there pertained to something that was an **[13478]** element of the offense. Here the element of the offense is a scheme to defraud, and the instruction makes clear that they have to agree unanimously on that scheme.

For those reasons, I will not give your proposed unanimity instruction as to the particular false pretense, representation or promise.

* * *

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 13, 2007
Defendants.	)	10:00 o'clock a.m.

VOLUME FIFTY-SIX
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

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[13486] THE COURT: Okay. U.S. versus Ratliffe. Mr. Corbett's letter to the Court of June 7th

cites Ratliffe **[13487]** in support of his Rule 29 motion, and Mr. Martin has submitted in his recent filing a request based on Ratliffe two amendments to Government's Revised Instruction 32; namely, the first one that the word victim in the first sentence be preceded by the word alleged, which I think is fine.

MR. SUSSMAN: That's fine, your Honor.

THE COURT: So make -- I will grant that request, make that change.

The second one is that the following sentence apply: "However, the scheme, if successful, must wrong the alleged victim's property rights in some way."

Mr. Siskel?

MR. SISKEL: Your Honor, the government objects to that language. It's based on a case outside the 7th Circuit, and I think the law is clear that it doesn't have to have actually resulted in a loss to the victim in order for there to be mail fraud.

THE COURT: I'm going to sustain your objection. It is relying on -- I'm not sure that that's exactly what that case says in the first place, and I am -- it's not the law in this circuit. I will sustain the government's objection and not give that.

I also have in that same filing from Mr. Martin Defendants' Revised Instruction 9A, the request to refer to Count 14 as interference with an official proceeding as

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APPENDIX T

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 13, 2007
Defendants.	)	10:00 o'clock a.m.

VOLUME FIFTY-SIX
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * *

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[13518] MR. GREENBERG: Now, that line is not one that the government indicated that they would take out. In fact, now I'm hearing for the first time, and I don't think we ever agreed to this in the beginning, that they are going to be talking about a tax fraud on Canada. Favorable tax treatment 6 is one thing. That is the language we understood, and that's a big difference. So anyway, you have --

THE COURT: I have the two versions. I understand your positions.

Verdict form. What is the government's response to the defendants' position on the verdict form? And a special post-verdict, which I've never seen done.

MR. SISKEL: Your Honor, the government objects to that procedure. I mean the brief that defense counsel have filed, you know, mentions several references in the case law to, you know, a general disfavoring of special verdicts.

There are also cases where, after reciting that, courts go on to give special verdicts even outside of the kind of Apprendi context when you have a complicated set of issues and where there is a need for the jury to separate out different theories of liability.

The cases cited that really express concern about a special verdict form I think involve a different scenario than the one that the government has proposed here. I mean the D.C. Circuit case, United States v. North, the Oliver North **[13519]** case, I think is a good example of that, where what the Court was really concerned about is that the way that the verdict -- special verdict form was framed, you know, it first asks do you find the defendant

guilty of, you know, obstruction of justice. And then if not, do you find him guilty of aiding and abetting obstruction of justice, and I think the fear there was that you're going through a progression of different options for how the jury could find the defendant guilty, and that is not the case.

What we have proposed is simply take each count, determine whether each defendant is guilty of that count, and then if you have found the defendant guilty of that, say which basis you found him guilty on.

That process of deliberation is exactly what the defense proposal would have the jury do because they're given a unanimity instruction, they're supposed to go through the thought process, do we find the defendants guilty of a particular count and are we unanimous on which basis. They're just saying we shouldn't have them put that down on a verdict form. We should bring them out, determine what they found, then send them back in and have them mark it.

It seems to me that's unnecessary and, two, the verdict form we propose doesn't present any of the problems that courts have identified with special verdict forms.

THE COURT: My concern also is what do we do if we **[13520]** get something inconsistent on the special verdict form?

MR. MARTIN: Your Honor, here's -- and I'm just speaking for Mr. Black because I don't know if the other 4 defendants agree with me.

I think this comes down to a question of whether the unanimity requirement applies to the honest services versus the money versus the

property. Now, your Honor just ruled this morning that it does not apply to the false statements.

THE COURT: Correct.

MR. MARTIN: I could -- I could argue it either way, to be honest with the Court. I mean I -- I don't think the law is very clear on it, and Mr. Greenberg found cases that go both ways on it.

If the Court is to give a special verdict, then youd have to give a unanimity instruction with respect to theories. Is that required? Well, that's an issue for your Honor to determine. I don't think it's required, but that's my personal view, and the other defendants may disagree with that.

The --

THE COURT: Was the proposal -- was the verdict form, the special verdict form only on behalf of Mr. Black?

MR. GREENBERG: No, it was on behalf of all defendants.

THE COURT: Okay, that's what I understood. **[13521]**

MR. MARTIN: We agree with the procedure, and that is if the Court is going to give one, we're asking that it be given afterwards, your Honor. And I don't think it's as clear as Mr. Siskel states. I mean there's been a well entrenched right in the law, and we argued this before, that a jury shouldn't have to be required to explain itself. That is, if the jury wants to find the defendants not guilty, they shouldn't be probed further, they shouldn't have to answer why they're making findings.

THE COURT: What's your position when I tell you that I'm not going to give a post-verdict special verdict form to the jury? I don't think --

MR. SCHACHTER: Your Honor --

THE COURT: I'm not going to do that.

MR. SCHACHTER: The only thought is, you know, if there are convictions, they're going to have to go back for forfeiture in any event. There's forfeiture allegations.

THE COURT: Unless your clients waive that, which they certainly can do.

MR. SCHACHTER: That's a possibility, but in all likelihood, they're going to need to go back.

THE COURT: I have never seen it done. I have absolutely never seen it done, and I tried a lot of criminal cases before I went on the bench and complex ones. I have never seen it done. I think it causes potential problems with **[13522]** inconsistencies with the verdict. I'm not going to do it.

So my question to you is knowing that I'm not going to send back a post-verdict special verdict form, what is your position on what the verdict form should look like?

MR. TUITE: Our position is we don't want it. We don't want it in the original verdict.

THE COURT: You don't want what you proposed.

MR. TUITE: No, we were proposing to do it post-verdict.

THE COURT: Okay.

MR. TUITE: If you're not going to give it post-verdict, then we don't --

THE COURT: You don't want a special verdict form.

MR. TUITE: That's our position.

MR. SCHACHTER: That's correct, your Honor.

THE COURT: Mr. Safer?

MR. SAFER: Yes.

THE COURT: Mr. Martin?

MR. MARTIN: I would just -- I think it comes down to whether there's a unanimity requirement with respect to honest services versus money and property.

THE COURT: That's what it comes down to. What's your position?

MR. MARTIN: If the Court is saying there is not -- that it's akin to the false statements – **[13523]**

THE COURT: I haven't ruled on that. I'm looking to you for what's your -- what's your position on it in terms of unanimity as to honest services and money and property?

MR. MARTIN: My position is is that there is no unanimity requirement for honest services and money and property.

THE COURT: So you don't think any special verdict form should be given.

MR. MARTIN: That's correct. And just to explain the reasoning, the issue from our perspective is that the jury must be unanimous on the scheme to defraud. The scheme to defraud can be committed in

one of two ways. We dont, because it's not a separate element of the offense, we don't think there's a unanimity requirement. That's Mr. Black's position.

And because there's not a unanimity requirement, asking the jury to check off whether they found honest services or money and property would result in confusion, would result in inconsistent verdicts because then the question is do they have to be -- they have to be 100 percent unanimous to check off the box?

THE COURT: Right.

MR. MARTIN: If they don't have to be, then there's no need for a special verdict.

THE COURT: So the verdict form that you proposed, **[13524]** even knowing the Court is not going to give a special verdict form, you stand on that.

MR. MARTIN: Well, no, we don't want a special verdict.

THE COURT: No, you stand on what you initially -- what you

MR. MARTIN: General verdict.

THE COURT: Your general verdict.

MR. MARTIN: That's correct.

THE COURT: Okay.

MR. TUITE: That's our position, Judge. We just think letting -- asking them if you find them guilty, it's sort of the Court saying there's a chance you're going to find them guilty, and then you go on to the next one.

Let them make a decision. I don't think they have to be unanimous, and make the decision and they don't have to tell us what basis the decision was made unless for purpose of Apprendi or Booker or whatever, after the verdict, if we want it and the Court says you're not going to give it, then we would rather it not be given at all.

THE COURT: Okay. All defendants are in agreement with that. I'll let you know.

MR. SUSSMAN: Your Honor, just so you understand the government's position because we have -- we filed the --

THE COURT: Special. **[13525]**

MR. SUSSMAN: We are offering, we filed the special verdict form that would allow the jury to indicate unanimity as to each of the -- in an abundance of caution as to each of the theories so that if there is any later concern that it could be clear that the jury found beyond a reasonable doubt as to which theory.

That having been said and we've offered it, we are not going to object to the defendants' proposed verdict form.

THE COURT: General form. Okay. What else? Anything else?

* * *

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 26, 2007 9:00 o'clock a.m.
Defendants.	)	

VOLUME SIXTY-THREE
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * * *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
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* * *

[14851]

THE COURT: Okay.

A question for the attorneys. I have looked at the verdict form, which you all agreed on.

MR. SCHACHTER: Your Honor, that's not accurate. We submitted a verdict form which is very different than the verdict form that was submitted by the government. The government submitted this verdict form without any discussion with us.

THE COURT: I thought there was agreement on this.

Your verdict form --

MR. SCHACHTER: I can hand up --

THE COURT: Hand it up, please.

MR. GENSON: Your Honor --

THE COURT: You were in agreement there should be a general verdict form?

MR. SCHACHTER: That's correct. **[14852]**

THE COURT: Okay. Let me see --

MR. GENSON: Your Honor, I know Marc talked to, I believe, Mr. Siskel.

I know Marc talked to Mr. Siskel this morning about one change --

MR. SISKEL: We'll make to the form.

MR. GENSON: -- that they'll make to the form.

THE COURT: Okay.

(Document tendered to the Court.)

MR. SCHACHTER: Your Honor, our differences are that the government's verdict form does not identify the mailings. We would like the mailings identified in the counts.

In addition to that, some of them are cosmetic. The verdict form that we submitted has the box for "Not Guilty" before the box for "Guilty."

The government reversed the order of that. We would like it "Not Guilty" first, but I refer to that as cosmetic.

The mailings are -- I don't know that the government has an objection to our verdict form.

THE COURT: What is your position on the mailings?

MR. SISKEL: We can put the mailings in.

What I did is I took the original one we proposed as a special verdict form and just removed the parts that were --

THE COURT: Okay.

MR. SISKEL: Can he detail --

[14853]

MR. SCHACHTER: I will show this verdict form to the government. Maybe they don't have an objection.

THE COURT: Why do you not put the mailings in?

MR. SISKEL: Sure.

THE COURT: It probably helps the jury simplify things. You can leave "Guilty" first and, then, "Not Guilty."

My question for you, because this does seem to be something you are in agreement on, for each defendant, you have essentially three verdict forms.

One verdict form: "We, the jury, find the defendant not guilty as charged in the Information."

One verdict form, "We, the jury, find the defendant guilty as charged."

And, then, a third verdict form that goes count by count, "Guilty," "Not Guilty" on each count.

That you do seem to be in agreement on.

My question for you is: Do we need the first two verdict forms or is that confusing to the jury? Is it sufficient to just have one verdict form that goes count by count?

Here is my concern: That a jury is going to get this. Let us just say they find guilty on one count and not guilty on everything else; but, then, they have a verdict form that says, "Okay, not guilty.

"Well, the person's not guilty on six of the charges, **[14854]** am I supposed to sign this, too?"

Or, "The defendant is guilty on one of the charges. Am I supposed to sign this, too?"

I do not think it is clear.

Now, I can go through extra efforts and explain it in detail. My concern is that it is confusing and I do not think anybody wants confusing verdicts coming back.

My recommendation is for each defendant to use what you have in here as the third verdict form, that breaks it down by each count that that particular defendant is charged in, and has "Guilty"

or "Not Guilty" for that particular count; and, then, has the place for each of the jurors to sign at the end.

That is my recommendation.

MR. SUSSMAN: That's fine.

THE COURT: Now, you have all agreed on this other form.

MR. ROMANO: Your Honor, with a few moments, I think we might be able to --

THE COURT: Perfect.

MR. ROMANO: -- resolve this.

THE COURT: Why do you not resolve it?

You should, Mr. Siskel, if you would make those changes. Put in the mailings on the count by count.

MR. SISKEL: Certainly.

[14855]

THE COURT: And, then, e-mail it to me so that I can tinker with it.

MR. SISKEL: Yes.

THE COURT: If I need to.

* * *

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 27, 2007 9:00 o'clock a.m.
Defendants.	)	

VOLUME SIXTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * * *

PROCEEDINGS RECORDED BY
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* * *

[15167] The Information charges defendants with committing mail and wire fraud in two different ways.

First, defendants are charged with mail and wire **[15168]** fraud for participating in a scheme to obtain money or property by means of materially false pretenses, representations or promises.

Second, defendants are charged with mail and wire fraud for participating in a scheme to deprive Hollinger International and its public shareholders of their intangible right to the honest services of the corporation's officers, directors and/or controlling shareholders.

A scheme is a plan or course of action formed with the intent to accomplish a particular purpose. A scheme to defraud is a scheme that is intended to deceive or cheat a person or entity and to obtain money or property and caused the potential loss of money or property to a person or an entity; or, to deprive Hollinger International and its shareholders of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger International.

In order to deprive Hollinger International and its public shareholders of their intangible right to defendants' honest services, the government must prove that the particular defendant you are considering misused his position for private gain for himself and/or a co-schemer.

Private gain does not include job security or compensation in the regular course of employment through above-board channels. **[15169]**

In considering whether a defendant has engaged in a scheme to defraud another of a right to

the defendant's honest services, you must first find that the defendant owed that other person or entity a fiduciary duty.

Honest services include those fiduciary duties owed under Delaware law by an officer, director or controlling shareholder to a corporation and its public shareholders.

A controlling shareholder is an entity or individual shareholder who directly or indirectly either owns a majority interest in the corporation or who exercises control over the business affairs of the corporation.

Under Delaware law, a corporation's officers, directors and controlling shareholders owe a fiduciary duty of loyalty to the corporation and its public shareholders.

The duty of loyalty requires that the directors, officers and controlling shareholders of a corporation act in the corporation's best interests; and, that they refrain from taking actions that either conflict with the corporation's interests or that harm the corporation.

Before you can find that a defendant has deprived Hollinger International and its public shareholders of his honest services, you must find that the defendant knowingly and intentionally breached his duty of loyalty.

If the transaction at issue is entirely fair to the corporation, then the government has not proven a breach of **[15170]** the duty of loyalty.

In considering whether a particular transaction is entirely fair to the corporation, you should consider two basic aspects:

Fair dealing and fair price. Fair dealing requires a fair process. Fair dealing considers whether the transaction was timed -- I'm sorry, fair dealing considers when the transaction was timed -- how it was initiated, structured and negotiated; whether or how the transaction was disclosed to the directors; and, whether or how the approvals of the directors were obtained.

Fair price requires that the transaction was substantively fair by examining the economic and financial considerations of it. You must consider both aspects of entire fairness.

If the material facts concerning a director's, officer's or controlling shareholder's interest in a particular transaction were disclosed to or known by the independent directors on the Board of Directors or the Audit Committee when the Board or committee approved or ratified the transaction, or the transaction was entirely fair to the corporation and its public shareholders, then that director, officer or controlling shareholder has not breached his duty of loyalty to the corporation.

A Board of Directors or Audit Committee can ratify a prior unauthorized transaction. Ratification has the same **[15171]** effect as approval. In order for such ratification to be valid, the Board of Directors or Audit Committee must have acted on complete disclosure of the material facts and circumstances surrounding the transaction. A subsequent ratification relates back to the transaction as of the date when the transaction occurred.

Materiality is an element of the offense of mail and wire fraud. A misrepresentation or omission is material if it has a natural tendency to influence or

is capable of influencing the decision of the decision-making body to which it was addressed.

A breach of fiduciary duty owed by an officer, director or controlling shareholder under Delaware law does not, in and of itself, amount to a violation of the mail or wire fraud statute. That is to say, even if you find beyond a reasonable doubt that an officer, director or controlling shareholder knowingly breached or knowingly schemed to breach his or her fiduciary duty, you must still determine whether the government has proven all of the elements of the crime charged beyond a reasonable doubt.

You have heard evidence in this case regarding the disclosures of non-competition payments in Hollinger International's quarterly and annual reports and proxy statements in 2001 and 2002. The defendants in this case are not charged with securities fraud. **[15172]**

The phrase "intent to defraud" means that the acts charged were done knowingly, with the intent to deceive or cheat Hollinger International and its public shareholders, in order to cause a gain of money or property to the defendants or others; and the potential loss of money or property to another; or, to deprive the corporation and its shareholders of their right to the honest services of their corporate officers.

Good faith on the part of a defendant is inconsistent with an intent to defraud, an essential element of the charge. The burden is not on the defendant to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with intent to defraud.

The mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime. The scheme to defraud need not have succeeded for the mail or wire fraud statute to be violated.

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrued to his co-schemers, as long as the government has proved the other elements of mail or wire fraud beyond a reasonable doubt.

A defendant's association with his alleged co-schemers or persons alleged to be members of an enterprise is not, by itself, sufficient to prove his participation or [15173] membership in a scheme or enterprise.

If a defendant performed acts that advanced or assisted a criminal activity, but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish a defendant's guilt.

As to the mail fraud counts, the government must prove that the United States mails or a private or commercial interstate carrier were used to carry out the scheme or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States mails or a private or commercial interstate carrier, a defendant need not actually intend that use to take place. You must find that the defendant knew this would actually occur; or, that the defendant knew that it would occur in the ordinary course of business; or, that the defendant knew facts from which that use could reasonably have been foreseen.

However, the government does not have to prove that a defendant knew that the interstate -- that the carrier was an interstate carrier.

The defendant need not actually or personally use the mail or interstate carrier.

Although an item mailed or sent by interstate carrier need not, by itself, contain a fraudulent representation or promise or request for money, it must further or attempt to [15174] further the scheme. Each separate use of the mail or an interstate carrier in furtherance of the scheme to defraud constitutes a separate offense.

As to the wire fraud counts, the government must prove that interstate communication facilities were used to carry out the scheme or were incidental to an essential part of the scheme. In order to cause interstate wire communications to take place, a defendant need not actually intend that use to take place.

You must find that the defendant knew this use would actually occur; or, that the defendant knew that it would occur in the ordinary course of business; or, that the defendant knew facts from which that use could reasonably have been foreseen.

However, the government does not have to prove that a defendant knew that the wire communication was of an interstate nature.

The defendant need not actually or personally use the interstate communication facilities. Although an item communicated interstate need not, by itself, contain a fraudulent representation or promise or request for money, it must further or attempt to further the scheme.

Each separate use of interstate communication facilities in furtherance of the scheme to defraud constitutes a separate offense.

[15175] The following types of transactions constitute transmissions by means of wire communication in interstate commerce within the meaning of the wire fraud statute: E-mails, faxes, filing of public documents by wire and electronic money transfers.

This instruction applies to your consideration of Counts 10 and 11: Regulations in effect between 2000 and 2002 regarding disclosures in proxy statements filed with the SEC from 2000 to 2002 require disclosures of perquisites or other personal benefits, securities or properties not categorized as salary or bonus.

Unless the aggregate amount of the perquisite, personal benefit, securities or properties is less than the lesser of either $50,000 or 10 percent of the total of annual salary and bonus reported for the named executive officer.

For purposes of disclosures in a proxy statement, perquisites and other personal benefits are valued on the basis of the aggregate incremental cost to the reporting corporation and its subsidiaries during the one-year period. This means that the value of a perquisite or other personal benefit is computed solely on the basis of the actual additional cost to the corporation.

This instruction relates to your consideration of counts 10 and 11: A fact or omission is material if there is a substantial likelihood that a reasonable investor would **[15176]** consider the fact or omission

significant or important in deciding whether to buy, sell or hold securities.

In other words, there must be a substantial likelihood that the fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.

Instructions regarding concealing documents from an official proceeding for Count 13.

Defendant Black is charged individually with concealing documents from an official proceeding in Count 13. To sustain the charge of concealing documents from an official proceeding, as charged in Count 13 of the Information, the government must prove the following propositions:

First, on or about May 20th, 2005, the defendant corruptly concealed or attempted to conceal records, documents or other objects; and, second, the defendant did so with the intent to impair the availability of the records, documents or other objects in an official proceeding.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find defendant Black guilty as to Count 13.

If, on the other hand, you find from your consideration of all the evidence that anyone of these propositions has not been proved beyond a reasonable doubt, **[15177]** then you should find defendant Black not guilty of Count 13.

The term "corruptly" means having an improper purpose; an intent to subvert or undermine the fact-finding ability of an official proceeding is an improper purpose.

The term "official proceeding" includes a proceeding before a judge or court of the United States; a proceeding before a federal grand jury; or, a proceeding before a federal government agency, which is authorized by law.

The United States Securities and Exchange commission -- the SEC -- is a federal government agency which is authorized by law.

Neither an investigation by the United States Attorney's office nor any Canadian court proceeding, nor any internal corporate document retention policy constitutes an official proceeding.

An official proceeding need not be pending or about to be instituted at the time of the offense. An official proceeding, however, must have been reasonably foreseeable to the defendant.

The government bears the burden of proving beyond a reasonable doubt that the official proceeding was reasonably foreseeable to the defendant.

There are three official proceedings identified in Count 13: One, an SEC proceeding against defendant Black; two, a criminal investigation of defendant Black by a federal page **[15178]** grand jury; and, three, a pending criminal proceeding against defendant Black before the United States District Court.

To find defendant Black guilty of Count 13, the government does not need to prove beyond a reasonable doubt that Black intended to impair the availability of the records, documents or other objects in all three official proceedings.

Instead, the government must prove beyond a reasonable doubt that defendant Black intended to impair the availability of the records, documents or other objects in at least one of those official proceedings.

However, you must unanimously agree on which of the official proceedings, if any, Black intended to obstruct.

Instructions regarding racketeering for Count 14.

Defendant Black is charged individually with racketeering in Count 14. To prove defendant Black guilty of racketeering as charged in Count 14, the government must prove the following propositions:

First, that there was an association in fact enterprise, the Hollinger enterprise, comprised of Conrad Black, David Radler, John Boultbee, Peter Atkinson, Mark Kipnis and the Ravelston Group, Inc.

Second, that defendant Black was associated with the Hollinger enterprise.

Third, that defendant Black knowingly conducted or participated in the conduct of the affairs of the Hollinger **[15179]** enterprise through a pattern of racketeering activity as described in Count 14.

Fourth, that the activities of the Hollinger enterprise affected interstate commerce.

And, fifth, that the commission of at least one of the racketeering acts described in Count 14 occurred on or after November 17th, 2000.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find defendant Black guilty as to Count 14.

If, on the other hand, you find from your consideration from all the evidence anyone of these propositions has not been proved beyond a reasonable doubt, then you should find defendant Black not guilty of Count 14.

In order to find a pattern of racketeering activity for purposes of Count 14, you must find beyond a reasonable doubt that defendant Black committed or caused another person to commit at least two racketeering acts described in Count 14; and, that those acts were in some way related to each other; and, that there was continuity between them and that they were separate acts.

Although a pattern of racketeering activity must consist of two or more acts, deciding that two such acts were committed by itself may not be enough for you to find that a **[15180]** pattern exists.

Acts are related to each other if they are not isolated events; that is, if they have the same -- if they have similar purposes or results or participants or victims or are committed a similar way or have other similar distinguishing characteristics or are part of the affairs of the same enterprise.

There is continuity between acts if, for example, they are ongoing over a substantial period; or, they are part of the regular way some entity does business or conducts its affairs. The government need not prove that all of the acts described in Count 14 were committed, but you must unanimously agree as to which two or more racketeering acts defendant

Black committed or caused to be committed, in order to find defendant guilty of that count.

The term "enterprise" can include a group of people or legal entities associated together for a common purpose of engaging in a course of conduct. This group may be associated together for purposes that are both legal and illegal.

In considering whether a group is an enterprise, you should consider whether it has an ongoing organization or structure; either formal or informal; and, whether the various members of the group functioned as a continuing unit.

A group may continue to be an enterprise even if it changes membership by gaining or losing members over time.

* * *

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 27, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME SIXTY-THREE
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * *

PROCEEDING RECORDED BY
MECHANICAL STENOGRAPHY
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* * *

[15195] MR. GENSON: Thank you.

MR. NEWMAN: How about at the beginning of the day, Judge?

THE COURT: I do not bring them back at the beginning of the day. They go right to the jury room and start deliberating.

If I get a note, you will hear from us and you should get down here. Again, do not go too far.

Ideally, do not be more than 15 minutes away.

When the verdict comes in, you will hear from us and I will set a time a half hour out and tell you to be in court from there.

Are there any other procedural issues?

MR. TUITE: Yes.

Judge, for the record, we would renew our objections to all instructions that were given over objection, and all instructions that we tendered and that you refused, and our motion for severance.

THE COURT: Okay. I will consider that renewed.

MR. SCHACHTER: As do we, your Honor.

MR. SAFER: Us, too, your Honor.

MR. GENSON: We all do.

THE COURT: Okay.

I just wanted to make sure you got on the record there, Mr. Genson.

* * *

SUPPLEMENTAL APPENDIX

No. 08A1063

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

APPLICATION OF PETITIONER BLACK FOR BAIL PENDING APPEAL

SUPPLEMENTAL APPENDIX

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Black

May 29, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	**No. 05 CR 727-02**
vs.	)	
	)	
JOHN A. BOULTBEE,	)	
(USM # 18338-424)	)	
	)	
Defendant.	)	

ORDER

Whereas John A. Boultbee, USM #18338-424, a Canadian national and domiciliary, was convicted following trial in the Northern District of Illinois, on three counts of mail fraud (18 U.S.C. §§1341, 1346) and sentenced on December 10, 2007, to, *inter alia*, a 27-month term of imprisonment, which he is currently serving at FCI Lompoc, a facility of the United States Bureau of Prisons ("BOP"), following the affirmance of his judgment of conviction by the United States Court of Appeals for the Seventh Circuit on June 25, 2008, and his voluntary surrender thereafter on July 10, 2008; and

Whereas on May 18, 2009, the United States Supreme Court granted Mr. Boultbee's petition for a writ of certiorari (2009 WL 62169) to review the order of the Court of Appeals affirming the judgment of conviction; and

Whereas the government agrees that Mr. Boultbee satisfies all of the standards set

forth in 18 U.S.C. §3143(b) for release pending appeal, including that he is not a risk of flight or danger to the community and, if successful in the United States Supreme Court, he may be entitled to a new trial: and

Whereas upon his release, Mr. Boultbee desires to and will return to his home in Victoria, British Columbia, Canada, to await the outcome of the United States Supreme Court review of his conviction and the affirmance by the Court of Appeals; and

Whereas a financially responsible United States citizen, Mark Wilkinson, has agreed to sign as surety an appearance bond for Mr. Boultbee, guaranteeing Mr. Boultbee's appearance when and where directed by the Court; and

Whereas the government consents to Mr. Boultbee's release from the custody of the BOP and the Department of Homeland Security ("DHS"), Bureau of Immigration and Custom Enforcement ("ICE"), and his return to Canada, pending United States Supreme Court review and upon Mr. Wilkinson's execution as surety of an appearance bond in the face amount of $500,000; now therefore

IT IS HEREBY ORDERED AND DECREED that

1. John A. Boultbee (USM # 18338-424) be released forthwith from the custody of the BOP and ICE;

2. John A. Boultbee be permitted to return immediately to his home in Canada, the country in which he shall remain, pending United States Supreme Court review and determination of the order of the Court of Appeals affirming his judgment of conviction;

and

3. John A. Boultbee appear when and where this Court shall direct.

Dated: May 28, 2009

AMY J. ST. EVE
United States District Court Judge

UNITED STATES DISTRICT COURT

for the

Northern District of Illinois

United States of America	)	
v.	)	
	)	Case No. 05 Cr 727
John A. Boultbee USM # 18358-424	)	
Defendant	)	

ORDER SETTING CONDITIONS OF RELEASE

IT IS ORDERED that the defendant's release is subject to these conditions:

(1) The defendant must not violate any federal, state or local law while on release.

(2) The defendant must cooperate in the collection of a DNA sample if the collection is authorized by 42 U.S.C. § 14135a.

(3) The defendant must immediately advise the court, defense counsel, and the U.S. attorney in writing before any change in address or telephone number.

(4) The defendant must appear in court as required and must surrender to serve any sentence imposed.

The defendant must appear at: *(if blank, as directed)*

Place

on

Date and Time

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released on condition that:

(✓) (5) The defendant promises to appear in court as required and surrender to serve any sentence imposed.

(✓) (6) The defendant's surety, Mark Wilkinson, executes an unsecured bond binding the surety to pay to the United States the sum of Five Hundred Thousand Dollars ($500,000) in the event of defendant's failure to appear as required or surrender to serve any sentence imposed.

DISTRIBUTION: COURT DEFENDANT PRETRIAL SERVICES U.S. ATTORNEY U.S. MARSHAL

BEST AVAILABLE COPY

ADDITIONAL CONDITIONS OF RELEASE

Upon finding that release by one of the above methods will not by itself reasonably assure the defendant's appearance and the safety of other persons or the community, IT IS FURTHER ORDERED that the defendant's release is subject to the conditions marked below:

(7) The defendant is placed in the custody of:

Person or organization

Address (and telephone) (or organization)

City and state Tel. No. (or organization)

who agrees to supervise the defendant in accordance with all of the conditions of release, do to use every effort to assure the defendant's appearance at all scheduled court proceedings, and to notify the court immediately if the defendant violates any condition of release or disappears.

Signed:

Custodian or Proxy Date

(8) The defendant must:

(a) report to the

telephone number ... no later than

(b) execute a bond or an agreement to forfeit upon failing to appear, is required the following sum of money or designated property:

(c) post with the court the following proof of ownership of the designated property, or the following amount or percentage of the above-described sum:

(d) execute a bond with solvent sureties in the amount of $

(e) maintain or actively seek employment

(f) maintain or commence an education program

(g) surrender any passport to

(h) obtain no passport

✓ (i) abide by the following restrictions on personal association, place of abode, or travel: Travel only permitted between Canada and U.S. absent government and court consent

(j) avoid all contact, directly or indirectly, with any person who is or may become a victim or potential witness in the investigation or prosecution, including but not limited to:

(k) undergo medical or psychiatric treatment

(l) return to custody each (week/day) at ... o'clock after being released each (week/day) at ... o'clock for employment, schooling, or the following purposes:

(m) maintain residence in a halfway house or community corrections center, as the pretrial services office or supervising officer considers necessary

✓ (n) refrain from possessing a firearm, destructive device, or other dangerous weapons

(o) refrain from ... excessive use of alcohol

✓ (p) refrain from any use or unlawful possession of a narcotic drug or other controlled substance defined in 21 U.S.C. § 802, unless prescribed by a licensed medical practitioner

(q) submit to any testing required by the pretrial services office or the supervising officer to determine whether the defendant is using a prohibited substance. Any testing may be used with random frequency and include in the testing the wearing of a sweat patch or a hair alcohol testing system, and/or any form of prohibited substance screening or testing. The defendant must refrain from absence or assertion of the defendant's claim, with the efficiency and accuracy of any prohibited substance testing or monitoring which is required as a condition of release.

(r) participate in a program of inpatient or outpatient substance abuse therapy and counseling if the pretrial services office or supervising officer considers it advisable.

(s) participate in one of the following location monitoring program components and abide by its requirements as the pretrial services office or supervising officer instructs:

(i) Curfew. You are restricted to your residence every day ... as directed by the pretrial services office or supervising officer.

(ii) Home Detention. You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities preapproved by the pretrial services office or supervising officer.

(iii) Home Incarceration. You are restricted to 24-hour-a-day lock-down except for medical necessities and court appearances or other activities specifically approved by the court.

(t) submit to the location monitoring indicated below and abide by all of the program requirements and instructions provided by the pretrial services office or supervising officer related to the proper operation of the technology.

(u) The defendant must pay all or part of the cost of the program based upon your ability to pay as the pretrial services office or supervising officer determines.

(v) Location monitoring technology as directed by the pretrial services office or supervising officer:

(i) Radio Frequency (RF) monitoring

(ii) Passive Global Positioning Satellite (GPS) monitoring

(iii) Active Global Positioning Satellite (GPS) monitoring (including "Hybrid" Active Passive GPS)

(iv) Voice Recognition monitoring

✓ (x) Defendant must reside in Canada until the U.S. Supreme Court decides his appeal and issues its mandate, and in the event the judgment of conviction is affirmed, defendant shall voluntarily surrender to the custody of the U.S. Bureau of Prisons as directed by the court.

DISTRIBUTION: COURT DEFENDANT PRETRIAL SERVICES U.S. ATTORNEY U.S. MARSHAL

ADVICE OF PENALTIES AND SANCTIONS

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

Violating any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of your release, an order of detention, a forfeiture of any bond, and a prosecution for contempt of court and could result in imprisonment, a fine, or both.

While on release, if you commit a federal felony offense the punishment is an additional prison term of not more than ten years and for a federal misdemeanor offense the punishment is an additional prison term of not more than one year. This sentence will be consecutive (i.e., in addition to) to any other sentence you receive.

It is a crime punishable by up to ten years in prison, and a $250,000 fine, or both, to obstruct a criminal investigation, tamper with a witness, victim, or informant; retaliate or attempt to retaliate against a witness, victim, or informant; or intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If, after release, you knowingly fail to appear as the conditions of release require, or to surrender to serve a sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more – you will be fined not more than $250,000 or imprisoned for not more than 10 years, or both;

(2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years – you will be fined not more than $250,000 or imprisoned for not more than five years, or both;

(3) any other felony – you will be fined not more than $250,000 or imprisoned not more than two years, or both;

(4) a misdemeanor – you will be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender will be consecutive to any other sentence you receive. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of the Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release, to appear as directed, and surrender to serve any sentence imposed. I am aware of the penalties and sanctions set forth above.

John A. Boucher KAG

Defendant's Signature

Date and Sub

Directions to the United States Marshal and the U.S. Bureau of Prisons

(✓) The defendant/inmate (USM # 18338-424) is ORDERED released forthwith

( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judge that the defendant has posted bond and/or complied with all other conditions for release. If still in custody, the defendant must be produced before the appropriate judge at the time and place specified.

Date: 5-28-09

[signature]

Signature of Judge

Amy J. St. Eve

Printed Name and Title

DISTRIBUTION: COURT DEFENDANT PRETRIAL SERVICES U.S. ATTORNEY U.S. MARSHAL

AO 98A (Rev. 11/07) Appearance and Compliance Bond

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
V.

APPEARANCE AND COMPLIANCE BOND

John Boulthee
Defendant

Case Number: 05 CR 727

☐ Non-surety: I, the undersigned defendant acknowledge that I and my . . .
☒ Surety: We, the undersigned, jointly and severally acknowledge that we and our . . .
personal representatives, jointly and severally, are bound to pay to the United States of America the sum of
$ 500,000, and there has been deposited in the Registry of the Court the sum of
$ -0- in cash or ✓ (describe other security).

The conditions of this bond are that the defendant, John Boulthee
Name
is to (1) appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States District Court to which the defendant may be held to answer or the cause transferred; (2) comply with all conditions of release imposed by the court, and (3) abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing bond (including any proceeding on appeal or review), which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on May 28, 2009 (Date) at Chicago, Illinois (Place)

Defendant John Boulthee

Surety

Surety

Signed and acknowledged before me on May 28, 2009 (Date)

FILED
5-28-09
MAY 28 2009

Signature of Judge/Clerk

Bond Approved:
Judge
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

OPPOSITION BRIEF

FILED
APR 2 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-876

In the Supreme Court of the United States

CONRAD M. BLACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
RITA M. GLAVIN
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners are entitled to reversal of their mail fraud convictions because the district court did not instruct the jury that, to find them guilty under an honest-services theory, the jury had to find that their fraudulent scheme "reasonably contemplated identifiable economic harm" to their employer.

2. Whether, by opposing the government's request for a special verdict that would have required separate findings on property-rights and honest-services mail fraud, petitioners forfeited their claim that their mail fraud convictions must be reversed because the honest-services theory was legally invalid.

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In the Supreme Court of the United States

No. 08-876

CONRAD M. BLACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2008. A petition for rehearing was denied on August 13, 2008 (Pet. App. 18a-19a). On October 29, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 10, 2009, and the petition was filed on January 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were each convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. In addition, petitioner Black was convicted of obstructing justice, in violation of 18 U.S.C. 1512(c)(1). The district court granted petitioner Kipnis's motion for a judgment of acquittal on one of the mail fraud counts. Black was sentenced to 78 months in prison, petitioner Boultbee to 27 months, and Kipnis to probation with six months of home detention. The court of appeals affirmed. Pet. App. 1a-17a.

1. Petitioners were senior executives of Hollinger International, Inc. (Hollinger), a publicly held company that, through subsidiaries, owns a number of newspapers in the United States and abroad. Hollinger was controlled by a Canadian company called Ravelston. Black controlled Hollinger through his majority stake in Ravelston. Boultbee also owned stock in Ravelston. Because of their holdings in Ravelston, it was in Black's and Boultbee's financial interest to funnel income received by Hollinger to Ravelston by having Hollinger pay Ravelston large management fees. Pet. App. 2a.

Hollinger had a subsidiary called APC, which owned a number of newspapers that it was in the process of selling. When APC had only one newspaper left—a weekly community paper in Mammoth Lake, California—Kipnis prepared and signed on behalf of APC an agreement that paid $5.5 million to Black, Boultbee, and David Radler, another Hollinger executive, purportedly in exchange for their promises not to compete with APC for three years after they stopped working for Hollinger. There was no reasonable possibility, however, that Black and the others would start a newspaper in

Mammoth Lake, which had population of approximately 7000 at that time. The checks representing the $5.5 million payments were backdated to the year in which APC had sold most of its newspapers in order to make the compensation for the non-competition agreements seem less preposterous. Petitioners failed to bring the transaction to the attention of either Hollinger's board of directors or its audit committee, which was required to approve transactions between Hollinger's executives and the company (or its subsidiaries) because of conflict-of-interest concerns. Pet. App. 2a-3a.

Petitioners' defense at trial was that the $5.5 million represented management fees owed to Ravelston and that they had characterized the fees as compensation for non-competition agreements in the hope that Canada might not treat the fees as taxable income. But the evidence showed (1) that no document could be found to indicate that the $5.5 million in payments was ever approved by Hollinger or credited to the management-fees account on its books; (2) that the checks were drawn on APC, from which Ravelston had no right to management fees; and (3) that the payments were made to defendants personally instead of to Ravelston and came from the proceeds of a newspaper sale rather than from a management-fee account. Petitioners failed to disclose the $5.5 million in payments in the 10-K reports that they were required to file with the SEC, and they caused Hollinger to represent falsely to its shareholders that the payments had been made "to satisfy a closing condition" in connection with the sale of a newspaper. Pet. App. 3a-4a.

2. Petitioners were charged with, among other crimes, several counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. See Pet. App. 24a-121a. Section

1341 criminalizes the use of the mail to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

The government proceeded on two overlapping theories on the mail fraud counts at issue here: (1) that petitioners stole $5.5 million from Hollinger by fraudulently paying that sum to themselves in the form of bogus non-competition payments; and (2) that, in making the bogus non-competition payments to themselves, petitioners deprived Hollinger of their honest services as managers of the company. See Pet. App. 26a-30a, 36a, 52a-53a. Accordingly, the district court instructed the jury that it could find petitioners guilty of mail fraud if it found that they participated in a scheme either "to obtain money or property by means of materially false pretenses, representations, or promises," or "to deprive Hollinger International and its shareholders of their intangible right to the honest services of the corporate officers, directors or controlling shareholders." Gov't C.A. Separate App. 18 (Gov't C.A. App.).

The court instructed the jury that, in order to establish petitioners' guilt under the honest-services fraud theory, the government had to prove that petitioners misused their positions "for private gain for [themselves] and/or a co-schemer." Gov't C.A. App. 18. The court further instructed the jury that petitioners would not be guilty of honest-services mail fraud if the transaction on which the government relied to establish their guilt was "entirely fair" to the corporation, and that, in

determining whether the transaction was "entirely fair," the jury should consider whether the transaction involved "fair dealing" and a "fair price." *Id.* at 20. To determine whether a transaction involved a "fair price," the court instructed, the jury should examine "the economic and financial considerations" of the transaction. *Ibid.* In addition, the court instructed the jury that "[m]ateriality" is an element of a mail fraud offense, and that a misrepresentation or omission is material "if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* at 23.

The government asked the district court to require a special verdict by which the jury would indicate, if the jury found petitioners guilty, on which theory (property-rights fraud, honest-services fraud, or both) the jury had relied. Petitioners opposed the use of a special verdict. Instead, they proposed that the court adopt a "bifurcated" procedure under which the jury, in the event it returned a guilty verdict on any fraud count, would be sent back to the jury room to answer special interrogatories about the basis for the verdict. The district court rejected petitioners' proposal for post-verdict special interrogatories; in light of that rejection, and petitioners' opposition to a special verdict form, the district court used only a general verdict form. Pet. App. 11a, 222a-228a; Gov't C.A. Br. 64-65; Gov't C.A. App. 390-395.

The jury found each petitioner guilty on three mail fraud counts. See C.A. Separate App. 188. The district court subsequently granted Kipnis's post-verdict motion for judgment of acquittal on one of those counts. *Id.* at 221.

3. On appeal, petitioners contended that the district court's instructions on honest-services fraud were defi-

cient because they did not require the jury to find that petitioners' fraudulent scheme contemplated harm to Hollinger. Petitioners argued that, for a defendant to be guilty of mail fraud on an honest-services fraud theory, the defendant's fraudulently obtained private gain must be at the expense of the person or entity to whom the defendant owed his honest services. According to petitioners, their scheme was directed at depriving the government of Canada of tax revenue and not at harming Hollinger. Pet. C.A. Br. 45-50; Pet. C.A. Reply Br. 15-20; see Pet. App. 6a.

The court of appeals rejected what it characterized as petitioners' "no harm-no foul" claim. Pet. App. 6a. The court likened this case to *United States* v. *Holzer*, 816 F.2d 304 (7th Cir.), vacated on other grounds, 484 U.S. 807 (1987), which involved a judge who took bribes from litigants. The court explained that, just as the bribe-taking judge deprived the public of the honest adjudication services it thought it was purchasing in exchange for his salary, petitioners deprived Hollinger of the honest services they owed the company, even if "the inducement was the anticipation of money from a third party (the anticipated tax benefit)." Pet. App. 7a. The court observed that "if [petitioners] were trying to defraud Canada, that augmentation of their wrongdoing would not help their case." *Ibid.* The court explained by analogy that a private employee or judge who accepts a bribe but then defrauds the bribe-giver by refusing to take the action for which the bribe was paid is not materially less culpable for honest-services fraud than if he had performed his side of the bargain. *Id.* at 7a-8a.

The court of appeals also noted that "honest services fraud bleeds into money or property fraud." Pet. App. 8a. The court explained that, if petitioners had "dis-

closed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net [petitioners] a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees." *Ibid.* The court added that petitioners' conduct, which included causing Hollinger to make false SEC filings to cover up their scheme, was "bound to get [the] corporation into trouble with [Canada] and the SEC." *Id.* at 9a.

The court of appeals further held that, even if the instruction on honest-services mail fraud was incorrect, the error was harmless. The court stated that "[t]here is no doubt that the defendants received money from APC and very little doubt that they deprived Hollinger of their honest services." Pet. App. 9a. The court noted that whether petitioners "also got (or hoped to get) a tax break from the Canadian government was not an issue at trial." *Ibid.* The court observed that the government did not ask the jury to find petitioners guilty of honest services fraud on the basis that their private gain was at Canada's expense; rather, the government's theory was "straightforward"—namely, "that [petitioners] had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete." *Id.* at 10a. Accordingly, the court concluded, if the jury had believed that the payments to petitioners were actually management fees, as petitioners argued, then it would have acquitted them. *Ibid.*

Finally, the court of appeals held, in the alternative, that petitioners had forfeited their challenge to the jury instructions by objecting to the government's request for a special verdict that would have required the jury to

make separate findings on property fraud and on honest-services fraud. Pet. App. 11a. The court explained that, if the jury had been required to make such separate findings, then the challenge to the instructions might be "moot." *Id.* at 10a-11a. The court further held that petitioners' proposal for post-verdict interrogatories did not cure their forfeiture. The court stated that "[q]uestioning the jurors after they have handed down their verdict is not a good procedure and certainly not one that the district court is *required* to employ." *Id.* at 11a.

ARGUMENT

1. Petitioners contend (Pet. 14-15, 16-23) that the district court should have required the jury to find that their honest-services mail fraud scheme "reasonably contemplated identifiable economic harm" to their employer. Pet. 14. Petitioners failed to preserve that claim in the courts below, and it does not warrant this Court's review in any event.

a. As an initial matter, petitioners failed to preserve their claim in the district court. Although they objected to other aspects of the court's instructions on honest-services fraud, they did not object on the ground that the instructions failed to require a jury finding that their scheme "reasonably contemplated identifiable economic harm" to Hollinger. Petitioners state (Pet. 9, 30 n.12) that they adequately preserved their claim through their submission of two proposed instructions. But a proposed instruction is not sufficient to preserve an instructional claim for appeal; rather, the defendant must object to the instruction as actually given before the jury retires to deliberate, *Jones* v. *United States*, 527

U.S. 373, 387-388 (1999); Fed. R. Crim. P. 30(d)—which petitioners failed to do.

In any event, the proposed instructions on which petitioners rely did not preserve their claim. The government had requested an instruction that "[t]he mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime or financial gain to the defendants." Gov't C.A. App. 2. Relying on *United States* v. *Ratcliff*, 488 F.3d 639 (5th Cir. 2007), petitioners suggested adding a sentence to that instruction stating: "However, the scheme, if successful, must wrong the alleged victim's property rights in some way." Pet. App. 197a. Petitioners did not indicate that the proposed addition had anything to do with the proof required under an honest-services fraud theory, and *Ratcliff* was a property-fraud case that did not include an honest-services fraud charge. 488 F.3d at 644. In addition, petitioners' proposed instruction did not state that the fraudulent scheme must *contemplate* an adverse effect on the victim's property rights, the legal proposition for which petitioners contend in this Court. Instead, the instruction stated that, *if successful*, the scheme must *actually* adversely affect the victim's property rights. The two propositions are not equivalent. Accordingly, the proposed instruction did not preserve the claim petitioners assert here.[1]

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[1] This case is thus unlike *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 707 n.10 (2005), in which the defendant preserved a claim by proposing an instruction that was based on existing case law and objected to the instructions as given, even though in this Court, the defendant advocated a different formulation of a proper instruction. Petitioners here did not object to the instructions as given, and their harm-to-property rights proposed instruction (offered as part of the

Petitioners suggest that they preserved their current claim by submitting a second proposed instruction—that, "[i]n order to prove a scheme to defraud, the government must prove that it was reasonably foreseeable to the defendant that the scheme could result in some economic harm to the victim." Pet. App. 187a. Petitioners offered this instruction as a substitute for the government's proposed instruction that foreseeable economic harm is not an element of honest-services fraud. See *id.* at 193a, 207a. Thereafter, the parties mutually agreed to withdraw their proposed instructions, so neither instruction was given. See *id.* at 207a-208a. Petitioners' withdrawn instruction did not preserve their claim.

In the court of appeals, petitioners went even further and affirmatively disavowed the claim they now ask this Court to endorse. In this Court, petitioners contend (Pet. 14, 19-22) that, in an honest-services-fraud prosecution, the fraudulent scheme must contemplate *economic* harm to the party to whom the defendant owes his honest services. In the court of appeals, however, petitioners insisted that they were *not* "arguing that 'it is error to instruct a jury that an honest-services fraud does not require a contemplated loss of money or property to the victim.'" Pet. C.A. Reply Br. 15 (quoting Gov't C.A. Br. 54). Petitioners expressly stated that economic harm is not required. *Id.* at 15-16 ("Of course, if § 1346 means nothing else, it certainly means that one can commit mail fraud by depriving his victim of 'honest services,' rather than 'money or property.'").

Petitioners' claim in the court of appeals was that the jury instructions incorrectly allowed the jury to find

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general mail-fraud instructions) addressed a significantly different issue than their current plea for a contemplated-economic-harm instruction (offered as a requirement of honest-services fraud).

them guilty if they harmed the Canadian government rather than Hollinger. See Pet. App. 6a; Pet. C.A. Reply Br. 17-18. Petitioners contended that the instructions should have required the jury to find that their fraud was "at the expense of the party to whom the fiduciary duty was owed." *Id.* at 17 (quoting *United States* v. *Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003), cert. denied, 541 U.S. 1072 (2004)); see *id.* at 18 ("[H]arm to [Hollinger] should be a required element."). But petitioners expressly stated that the harm did not have to be economic. Pet. C.A. Reply Br. 15-16. Accordingly, petitioners waived the claim they now advance in this Court, and the Court should not consider it.

b. Even if petitioners had properly preserved their claim, it would not warrant this Court's review. The mail fraud statute makes it unlawful to use the mail to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the statute extended to schemes to deprive the public of the intangible right to the honest services of government officials. The courts of appeals also generally agreed that the intangible rights covered by the statute included the right of a private employer or principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

In *McNally*, this Court rejected the intangible rights theory, holding that the mail fraud statute in its then-existing form reached only schemes to deprive victims of money or property. 483 U.S. at 356, 358-360. Shortly

thereafter, Congress enacted 18 U.S.C. 1346 in order to restore the pre-*McNally* understanding of the scope of the mail fraud statute. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Accordingly, Congress's objective in enacting Section 1346 was to make clear that the coverage of the mail fraud statute is not limited to schemes to deprive the victim of money or property. Unlike property-rights fraud, honest services fraud hinges on deprivation of "the intangible right of honest services." For that reason, in an honest-services fraud prosecution, whether of the public- or private-sector variety, the government need not show that the defendant intended to deprive his victim of money or property. See, *e.g.*, *United States* v. *Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003), cert. denied, 543 U.S. 809 (2004); *United States* v. *Sun-Diamond Growers*, 138 F.3d 961, 974 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999); *United States* v. *Frost*, 125 F.3d 346, 369 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998).

At the same time, a defendant is guilty of honest-services mail fraud, as of mail fraud more generally, only if the fraud is "material." The materiality element operates to constrict the scope of Section 1346 in private-sector cases by distinguishing honest-services frauds that are properly actionable from those that are harmless and therefore do not warrant criminal prosecution. See *United States* v. *Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *Frost*, 125 F.3d at 368-369.

As petitioners point out (Pet. 19-23), the courts of appeals differ somewhat in their articulation of the ma-

teriality element of honest-services fraud in private-sector cases. Some courts of appeals require a showing that the defendant's misrepresentation or omission had a natural tendency to influence or was capable of influencing the employer to change his conduct. See, *e.g.*, *Rybicki*, 354 F.3d at 145-146; *Cochran*, 109 F.3d at 667-668 & n.3; *United States* v. *Gray*, 96 F.3d 769, 775, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997). The district court in this case instructed the jury consistently with that requirement. See Gov't C.A. App. 23 (instructing the jury that "[m]ateriality" is an element of honest-services fraud and that "[a] misrepresentation or omission is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed"). That test requires that the deprivation of honest services have a reasonable potential for causing the employer harm, though not specifically economic harm. See *Rybicki*, 354 F.3d at 146. Nonetheless, "the implicit assumption" of the test is that, in a business setting, an employer would change his conduct "only if, upon disclosure of the conflict [of interest] and any other relevant information, it saw new opportunities for profit or savings, or danger of economic harm." *Frost*, 125 F.3d at 368-369 (quoting *Lemire*, 720 F.2d at 1338).

Other courts of appeals have adopted a materiality test requiring a showing of "reasonably foreseeable economic harm." See *United States* v. *Vinyard*, 266 F.3d 320, 327-329 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *United States* v. *Martin*, 228 F.3d 1, 17 (1st Cir. 2000); *United States* v. *DeVegter*, 198 F.3d 1324, 1329-1330 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000); *Sun-Diamond Growers*, 138 F.3d at 973; *Frost*, 125 F.3d at 367-369; see also *Lemire*, 729 F.2d at 1338. Under

that test, the harm need not be the loss of money or property; it may consist, for example, of harm to the public reputation of a business. See *DeVegter*, 198 F.3d at 1329; *Martin*, 228 F.3d at 17; see also *Lemire*, 729 F.2d at 1336.

As courts have recognized, the "reasonably foreseeable economic harm" test merely makes explicit what is implicit in the "change of conduct" test—that, in a business setting, the harm caused by an employee's deprivation of his employer's right to his honest services will take an economic form. *Frost*, 125 F.3d at 368-369; *Lemire*, 729 F.2d at 1338. Thus, the courts that have adopted the "reasonably foreseeable economic harm" test acknowledge that the difference between the two standards is "slight," *Frost*, 125 F.3d at 368, and that the standards will, "[f]or the most part," produce "identical" results, *Vinyard*, 266 F.3d at 328 n.7. Because the two competing articulations of the materiality requirement do not produce materially different results, the difference in articulation does not warrant the Court's review.[2]

c. Even if the slight difference in how the courts of appeals articulate the materiality standard warranted the Court's review, this case would not be an appropriate vehicle for several reasons.

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[2] The absence of any substantial difference between the two standards is illustrated by the approach of the Eighth Circuit, which appears to merge them. That court has held that the defendant must contemplate "harm" to the employer, *United States* v. *Jain*, 93 F.3d 436, 441-442 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), and, "in most business contexts, that means financial or economic harm," but the court permits the requisite contemplation of harm to "be inferred from the willful non-disclosure by a fiduciary, such as a corporate officer, of material information he has a duty to disclose." *United States* v. *Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999).

First, because petitioners do not and could not credibly contend that the evidence was insufficient to establish reasonably foreseeable economic harm, they have raised the issue as a challenge to the jury instructions. Petitioners do not, however, cite a single case in which a court of appeals has reversed a private-sector, honest-services mail fraud conviction because the trial court gave a "change of conduct" materiality instruction instead of a "reasonably foreseeable economic harm" materiality instruction. And reversal on that ground would be particularly unwarranted here. This Court has repeatedly "cautioned that instructions must be evaluated not in isolation but in the context of the entire charge." *Jones*, 527 U.S. at 391. Here, in addition to giving the materiality instruction, the district court also instructed the jury that, to find petitioners guilty under the honest-services theory, it had to find that their conduct was not "entirely fair" to Hollinger, and that, in making that determination, the jury should examine the pertinent "economic and financial considerations." Gov't C.A. App. 20. Viewed together, the materiality and "fairness" instructions effectively required the jury to determine that petitioners' conduct threatened "foreseeable economic harm" to Hollinger.

Second, any error in the honest-services instruction was harmless. As the court of appeals explained, the jury would have acquitted petitioners of mail fraud under both the property theory and the honest-services theory if the jury had believed petitioners' arguments that the $5.5 million they received for the bogus non-competition agreements represented management fees that Hollinger legitimately owed to them. Pet. App. 9a-10a. "It was not the government's theory at trial" that petitioners "'misused' their positions at [Hollinger] for

personal gain in the form of Canadian tax benefits." *Id.* at 9a (brackets in original). Instead, "[t]he government's honest services theory was straightforward. It was that the defendants had abused their positions with Hollinger to line their pockets with phony management fees." *Id.* at 10a. Because the government never argued that the jury could find petitioners guilty of honest-services fraud if the money they received from Hollinger was legitimately owed to them, any error in not requiring an explicit finding that petitioners' fraud reasonably contemplated economic harm to Hollinger was harmless beyond a reasonable doubt.[3]

Third, as discussed above, petitioners failed properly to preserve their claim. Even if they had only forfeited the claim by failing to object to the instructions in the district court (and had not waived the claim entirely by disavowing it in the court of appeals), petitioners would be entitled to relief only if they could satisfy the plain-error standard. Fed. R. Crim. P. 52(b). Petitioners cannot satisfy that standard, which requires that they show an "obvious" error that "affect[ed] their sub-

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[3] Moreover, even if the $5.5 million had been legitimate management fees disguised, for personal tax reasons, as non-competition payments, it was readily foreseeable that petitioners' failure to disclose the payments to Hollinger's audit committee and board of directors could cause Hollinger economic harm. As the court of appeals explained, if petitioners had disclosed that "the recharacterization of management fees would net [petitioners] a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees." Pet. App. 8a. In addition, petitioners' failure to disclose the non-competition agreements caused Hollinger to make false filings with the SEC, conduct that was "bound to get [Hollinger] into trouble" and could foreseeably harm its business reputation, see *id.* at 9a, which has obvious economic repercussions.

stantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation" of the proceedings. *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993) (citations omitted). As evident from the discussion above, it is far from obvious that the challenged materiality instruction was erroneous. Moreover, any error in the instruction was harmless and therefore did not affect petitioners' substantial rights or the fairness, integrity, or public reputation of their trial. Thus, petitioners' claim that the jury was incorrectly instructed on the honest-services theory of mail fraud does not warrant this Court's review.

2. The second issue raised by petitioners also does not warrant this Court's review. As described above, the jury was instructed on both a property-rights theory of mail fraud and an honest-services theory. On appeal, petitioners contended that, even if they could properly have been found guilty of mail fraud under the property-rights theory, their mail fraud convictions still had to be reversed because of the purportedly erroneous materiality instruction on the honest-services theory. In making that contention, petitioners relied on *Yates* v. *United States*, 354 U.S. 298 (1957), which held that a conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. As an alternative basis for affirming petitioners' convictions, the court of appeals held that petitioners had forfeited their *Yates* claim because they opposed the government's motion for a special verdict, which would have allowed the jury to specify whether it was relying on the property-rights theory, the honest-services theory, or both. Pet. App. 11a. Petitioners contend (Pet. 23-32) that the court of appeals' forfeiture ruling was error.

As explained above, however, the court of appeals correctly rejected petitioners' instructional claim on the merits, concluding both that the challenged honest-services instructions were correct and that, even if the instructions were flawed, the error was harmless. And this Court has recently held that error on an alternative legal theory underlying a general verdict is subject to harmless error review. *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008). Accordingly, the judgment of the court of appeals is supported by two independent grounds in addition to its rejection of the *Yates* claim on forfeiture grounds. Because the court's judgment does not depend on the validity of the forfeiture ruling, this Court has no reason to review that issue.

Nor does that issue warrant review in its own right. The courts of appeals have recognized that a special verdict can eliminate the problem presented in *Yates* by enabling a reviewing court to be certain that "the facts as the jury believed them to be are a legally proper basis for conviction." *Tenner* v. *Gilmore*, 184 F.3d 608, 612 (7th Cir.), cert. denied, 528 U.S. 1052 (1999); see, *e.g.*, *United States* v. *Williams*, 441 F.3d 716, 720 (9th Cir.), cert. denied, 549 U.S. 927 (2006); *United States* v. *Najjar*, 300 F.3d 466, 480 n.3 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *Boots*, 80 F.3d 580, 589 (1st Cir.), cert. denied, 519 U.S. 905 (1996); *United States* v. *McNutt*, 908 F.2d 561, 565 (10th Cir. 1990), cert. denied, 598 U.S. 1084 (1991); *United States* v. *Wilkinson*, 754 F.2d 1427, 1432 (2d Cir.), cert. denied, 472 U.S. 1019 (1985). The Second Circuit, as well as the Seventh Circuit in the decision below, has indicated that a defendant therefore may forfeit a *Yates* argument if he opposes a government request for a special verdict. *Id.* at 1432. No court of appeals has held to the contrary.

Relying on decisions of the First, Second, Fifth, and Sixth Circuits, petitioners argue that special verdicts are "generally disfavored." Pet. 26 (citing, *e.g.*, *United States* v. *Ellis*, 168 F.3d 558, 562 (1st Cir. 1999); *United States* v. *Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987); *United States* v. *McCracken*, 488 F.2d 406, 418 (5th Cir. 1974); *United States* v. *Blackwell*, 459 F.3d 739, 766 (6th Cir. 2006), cert. denied, 549 U.S. 1211 (2007)). The First and Second Circuits, however, have approved the use of special verdicts as a means of avoiding automatic retrials where the government relies on multiple theories to support a particular charge and one of those theories later proves to be defective. See *United States* v. *Cianci*, 378 F.3d 71, 91 (1st Cir. 2004), cert. denied, 546 U.S. 935 (2005); *United States* v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *id.* at 925-928 (Newman, J., concurring in part and dissenting in part). And the Fifth and Sixth Circuits have relied on special verdicts indicating that convictions rested on valid theories in rejecting claims that reversal was required because the convictions might have rested on defective theories. See, *e.g.*, *United States* v. *Edwards*, 303 F.3d 606, 642 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); *United States* v. *Salvatore*, No. 01-30376, 2002 WL 663764, at *3 (5th Cir. Apr. 2, 2002) (34 Fed. Appx. 963 (Table)); *United States* v. *Peacock*, 654 F.2d 339, 348 (5th Cir. 1981), vacated in part on other grounds on reh'g, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983); *United States* v. *Cook*, 124 Fed. Appx. 367, 372, 375 (6th Cir. 2005); *United States* v. *Upshaw*, 114 Fed. Appx. 692, 699, 709 (6th Cir. 2004), vacated on other grounds, 545 U.S. 1136 (2005). See also *United States* v. *Giovanelli*, 945 F.2d 479, 489 (2d Cir. 1991) (same).

The primary concerns that courts have expressed about special verdicts are that they may lead the jury in a step-by-step progression to a guilty verdict and that they restrict the jury's "romantic power of nullification." See *Ruggiero*, 726 F.2d at 927 (Newman, J., concurring in part and dissenting in part). To the extent that those concerns have any validity, however, they are most strongly implicated when a special verdict form requires the jury to make specific findings on each element of an offense or makes resolution of a single factual issue determinative of guilt or innocence without regard to the offense elements. *Ibid.* Here, by contrast, the special verdict form would only have required the jury, in the event it reached a guilty verdict on a mail fraud count, to indicate on which of the two theories of mail fraud it had relied. The concerns about special verdicts are "either totally lacking or at best insignificant" in that situation. *Id.* at 928; see *United States* v. *Palmeri*, 630 F.2d 192, 202-203 (3d Cir. 1980), cert. denied, 450 U.S. 967, and 450 U.S. 983 (1981).[4]

Petitioners incorrectly contend (Pet. 27-28) that the court of appeals' forfeiture holding conflicts with the

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[4] Petitioners argue (Pet. 31) that a special verdict would have been unworkable here because the jury could properly have found them guilty of mail fraud if some jurors relied on the property-rights theory and the remainder relied on the honest-services theory. But nothing in the court of appeals' decision suggests that the court believed that the jury could have found petitioners guilty of mail fraud if they disagreed on the theory supporting their verdict. And the district court did not instruct the jurors that they could return a guilty verdict under those circumstances. Instead, the court gave the jury a general unanimity instruction. 05 CR 727 Docket entry No. 771, at 75 (N.D. Ill. June 27, 2007). Moreover, the special verdict form proposed by the government would have required the jury to indicate unanimity as to each of the theories. See Pet. App. 228a.

Third Circuit's decision in *United States* v. *Riccobene*, 709 F.2d 214, cert. denied, 464 U.S. 849 (1983). In *Riccobene*, the court rejected the argument that the defendant's opposition to the government's request for *post-verdict* special interrogatories constituted a forfeiture of their *Yates*-type claim. See *id.* at 228 & n.19. *Riccobene*, however, noted that the government had not argued that the district court had abused its discretion in denying the request, 709 F.3d at 228, and the Third Circuit later disallowed the use of post-verdict special interrogatories for the purpose of clarifying an ambiguous general verdict, see *United States* v. *Barrett*, 870 F.2d 953, 955 (1989). Consistent with the Third Circuit, the court of appeals here held that the district court correctly denied petitioners' request that it use post-verdict interrogatories for that purpose. Pet. App. 11a. And, consistent with the decision below, the Third Circuit has allowed the use of special interrogatories *on the verdict form itself* in order to secure particularized fact-finding. See, *e.g.*, *Barrett*, 870 F.2d at 954-955; *Palmeri*, 630 F.2d at 202-203. The Third Circuit has not addressed the question whether a defendant forfeits a *Yates* claim by opposing a government request for special interrogatories on the verdict form.

The decision below also does not conflict with the Second Circuit's decision in *United States* v. *Adcock*, 447 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 939 (1971). *Adcock* held that a defendant's failure to himself request a special verdict does not constitute a forfeiture. *Id.* at 1338-1339. The case for finding a forfeiture is much stronger where a defendant opposes a government effort to avoid the *Yates* situation by means of a special verdict than where the defendant fails to request a special verdict himself. Moreover, *Adcock* rested on the

Second Circuit's position at the time that special verdicts are *per se* improper, see *ibid.*, a position that court has since abandoned, see *Pforzheimer*, 826 F.2d at 205. Indeed, as noted above, since *Adcock*, the Second Circuit has held that a defendant's opposition to a government request for a special verdict may constitute a forfeiture. *Wilkinson*, 754 F.2d at 1432.

In any event, the *Yates* forfeiture issue has not recurred with sufficient frequency to justify this Court's intervention. Apart from the decision below, no federal appellate court has addressed the issue since the Second Circuit did so in *Wilkinson* in 1985. Before that, the issue had been addressed only by the Third Circuit in *Riccobene*, and then only in the distinguishable context of post-verdict interrogatories.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
RITA M. GLAVIN
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

APRIL 2009

REPLY BRIEF

Supreme Court, U.S.
FILED
APR 27 2009
OFFICE OF THE CLERK

No. 08-876

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500
Counsel for Petitioner Black

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
Counsel for Petitioner Kipnis

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REPLY BRIEF FOR PETITIONERS

The government's brief is more notable for what it omits than what it says. It never disputes that the circuits are divided on the meaning of "honest services" fraud in private-sector cases, contending instead—in the face of multiple published opinions expounding on the sharp divide among the circuits—that the split generates only "slight" differences. Similarly, the government never *mentions* its star witness, David Radler, who testified unequivocally that the payments at issue were fully authorized by Hollinger, and thus could not possibly be "theft." Nor does it mention that the case went to the jury on *uncontradicted* proof that the tax benefits petitioners sought were *lawful*, rather than a "fraud on Canada" as the government originally alleged. Finally, the government nowhere acknowledges that the jury *acquitted* on every count that depended on its "fraud-by-theft" theory. Indeed, it is a virtual certainty that the jury convicted on the three remaining fraud counts, under a malleable and indeterminate honest-services provision, only because the *lawful* Canadian tax benefits petitioners pursued were not disclosed to Hollinger—apparently in violation of principles of "fairness" under Delaware's corporation law (Opp. 15) and, more grievously and relevantly, in a manner that offended the ethical sensibilities of a federal prosecutor.

To divert attention, the government clings to two waiver theories—one manifestly frivolous and the other creating a circuit split *also* worthy of review. It needs the diversion because the alternative is to try to reconcile a substantial circuit split over Section

1346 with its theory of "materiality"—which appears *nowhere* in the decision below and, in any event, cannot disguise serious problems with the statute. As Justice Scalia recently noted, Section 1346's "plain text" purports to criminalize all manner of "dishonest" services. *Sorich v. United States*, No. 08-410 (Feb. 23, 2009), slip op. at 3 (Scalia, J. dissenting from denial of certiorari). "To avoid some of these extreme results," and in an effort to give the statute *some* pretense of passing constitutional muster, "the Courts of Appeals have spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles." *Id.* Their attempt to maintain a semblance of consistency during this process has proven a resounding failure: Indeed, "[n]o consensus has emerged." *Id.*

It is bad enough this problem persists in public corruption cases, such as *Sorich*, lying at the core of honest-services fraud. But in the *private* sector—where pre-*McNally* honest-services-fraud prosecutions were few and far between—the risks of overreaching, federalizing state-law fiduciary duties, and criminalizing otherwise clearly *lawful* conduct, simply because it violates corporate governance rules, are most acute.

This case plainly exposes the fault lines in current Section 1346 jurisprudence. Because, as the government's key witness unmistakably averred, the money at issue legitimately belonged to petitioners—and because they therefore contemplated no economic harm to Hollinger—their "crime" came down to giving the approved management fee a different label in pursuit of a lawful tax advantage. In at least

five circuits, petitioners would be free.[1] But not in the Seventh Circuit. After more than twenty years, the meaning of this pliable statute continues to bewilder judges and lawyers alike. It is therefore still fair to ask: "How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?" *United States v. Rybicki*, 354 F.3d 124, 160 (2d Cir. 2003) (Jacobs, J. dissenting). It is high time to replace free-wheeling prosecutorial creativity with consistent, sensible limits on honest services fraud prosecutions.

I. Petitioners Preserved Their Section 1346 Argument.

The government asks this Court to ignore a clear circuit split because petitioners purportedly "failed" to press the district judge hard enough to disobey the law of her circuit. But petitioners were unusually diligent in preserving their jury instruction claim for review. The government's argument to the contrary was utterly unpersuasive to the Seventh Circuit, and it has not improved with age.

This petition relies on the *same* cases petitioners cited to the trial court for their argument that the jury must find "it was reasonably foreseeable to the defendant that the scheme [to defraud] could result in some economic harm to the victim." Pet. App. 187a; Pet. 20 n.8. Petitioners explained that "the circuits are split on this issue of whether the mail fraud statutes include a 'reasonably foreseeable harm'

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[1] It is undisputed that prejudicial spillover dooms Black's obstruction conviction. Pet. 11 n.7.

test," (Pet. App. 194a (citing cases)), candidly informed the district judge that the Seventh Circuit had already *declined* to adopt their requested test, noted that this Court "has not resolved [the] conflict," and argued that if petitioners' position prevailed before this Court, the government's approach would be "error." *Id.* The judge, not surprisingly, agreed with the government that she was bound by Seventh Circuit law and rejected petitioners' request. Pet. App. 207a.

The government now says the parties "mutually agreed" to withdraw their proposed instructions. Opp. 10. This is false, as is clear from the passage the government cites for its claim. Pet. App. 207a-208a. There the government proposed its *own* instruction to foreclose petitioners from even "suggest[ing]" to the jury that it must find "reasonably foreseeable harm" to Hollinger. In marked contrast to its position *here*, the government acknowledged that "the law in other circuits" was "contrary" to its position, but asserted that under Seventh Circuit precedent "we don't have to show foreseeable harm." Pet. App. 208a. The government stated *it* was willing to "withdraw" *its own* proposed instruction if petitioners' foreseeable harm instruction "is not given." *Id.* Because the judge concluded that petitioners' proposed instruction could *not* be "given" under circuit law, she accepted the government's withdrawal of its (now unnecessary) instruction. Nowhere is there *one* word from any defense attorney, much less a "mutual" agreement, to withdraw the request. Nothing more was required to preserve petitioners' claim; indeed, the government has succeeded in obtaining review on much less. *Cf. United States v. Williams*, 504 U.S. 36, 43-44 (1992).

Finally, the government's assertion that petitioners failed to renew their objection before jury deliberations is just plain wrong. Opp. 8-9. Immediately after the jury was instructed, petitioners advised the court: "for the record, we would renew our objections to all instructions that were given over objection, and all instructions that we tendered and that you refused." Pet. App. 248a. The judge responded: "I will consider that renewed." *Id.* Petitioners complied with Rule 30(d).

No wonder the court of appeals rejected this argument. Pet. 30 n.12. In fact, the panel *instead* strained for a different, novel forfeiture rule (the second question presented) that applies only when an objection *has* otherwise been preserved. Pet. App. 11a (by seeking general verdicts, defendants forfeited "their objection to the instruction"; special verdicts would have rendered "the challenge to the instruction" moot). Petitioners preserved their objection.[2]

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[2] The contention that petitioners "affirmatively disavowed" their objection is even farther afield. Opp. 10. Petitioners' reply brief below (at 16) made a *different* point: if the government's deprivation-of-honest-services theory truly rested entirely on money "theft," it never should have *sought* an honest-services instruction. Petitioners added that this was *not* how the government tried the case, and not how the jury was instructed. *Id.* That *remains* petitioners' position, as is plainly apparent from our petition.

II. The Circuit Split On The Scope Of Section 1346 In Private-Sector Cases Involves A Recurring Issue Of Great Importance.

The government attempts to disguise the significant circuit split over private-sector honest-services fraud, calling it merely a "slight difference" in how courts articulate "materiality." Opp. 14-15. That explanation completely ignores the Seventh Circuit's reason for affirming, and bears no relationship to how the case was tried or decided. In any event, the government badly mischaracterizes the extent of the split, proving just how confused the law has become, and reinforcing the urgent need for review.

The instructions here allowed the jury to convict petitioners for pursuing a private gain in less than an "honest" manner, even though petitioners contemplated no economic or other property harm to their employer. The government cannot—and does not—deny that this is *not* a crime in at least five other circuits.

Instead, the government insists that the circuits merely diverge "slight[ly]" in their "articulation of the materiality element of honest-services fraud in private-sector cases." Opp. 12-13. But the opinion below cannot be defended on this manufactured basis—the court did not rely on a materiality requirement to affirm. In fact, that part of the opinion did not even *mention* materiality. Pet. App. 5a-6a ("[A]ll [the jury] had to find to support a conviction for honest services fraud was that the defendants had deliberately failed to render honest services to Hollinger and had done so to obtain a private gain.").

Moreover, other courts in the minority that *do* rely on the "materiality test" still diverge *significantly* from the rest of the circuits. "Materiality," in

private-sector cases, means the "misrepresentation or omission" had a "natural tendency to influence" or was "capable of influencing" the victim's "decision." Pet. App. 237a-238a. The circuits in the majority do not simply apply a *different* materiality standard; instead, they outright *reject* a materiality test precisely because it places *no* appropriate limit on Section 1346's reach. As the Fourth Circuit explains, because under "the materiality test * * * even trivial frauds might provoke a change in business practices, bringing such a situation within the scope of § 1346 would potentially criminalize any breach of a duty of loyalty in the private employment context." *United States v. Vinyard*, 266 F.3d 320, 328 (4th Cir. 2001). The Sixth Circuit likewise has warned why materiality does *not* cabin Section 1346: if "a business alters its behavior merely to avoid the *appearance* of impropriety, rather than a potential economic loss, the intangible right to honest services doctrine *may lack substantive limits* in the private sector." *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997) (second emphasis added). These stark differences in outcomes cannot possibly be described as "slight."

This case perfectly demonstrates why the government's position renders the statute "nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich*, slip op. at 3. The government repeatedly encouraged the jury to treat Section 1346 as a *different* type of mail fraud—sufficient by itself for conviction—not one harmlessly "overlapping" with the government's separate simple-theft theory. Opp. 4; *e.g.*, Pet. App. 173a ("[T]his is partly about the theft of money * * *. But there's the other part of it, too. That loyalty, that honest services that all five of these men owed to the company.").

The government confidently declares the verdicts taint-free because it supposedly "never argued that the jury could" convict petitioners "if the money they received from Hollinger was legitimately owed to them." Opp. 16; *contra* Pet. 8-9. But everyone knows the jury *did not* convict based on what the government *argued*—it acquitted petitioners of 90% of the $60 million alleged fraud. And the most significant thing distinguishing the APC transaction from those on which the jury acquitted was not the government's "personal piggy bank" theory; it was the unwavering testimony of Radler, the *government's* star witness, that (without notice to Hollinger) he recharacterized legitimately earned management fees as non-competition payments to take advantage of a Canadian tax ruling. Pet. 7-8.[3] Thus, there can be little doubt the jurors convicted petitioners, not for stealing from Hollinger, but for failing to inform its board how they went about seeking a *legitimate* "private gain" in Canada.[4]

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[3] This *government*-sponsored testimony was more than sufficient to negate proof of petitioners' *intent* to steal. And the government flat out ignores that the non-competition agreements prevented petitioners from competing, post-departure, with *any* of APC's "affiliates" (hundreds of publications), not just its remaining California newspaper. Pet. 7 & n.5; Pet. App. 159a.

[4] If jurors rejecting the theft theory really "would have acquitted petitioners" under honest-services fraud *too*, Opp. 15, the government surely could offer *some* legitimate reason for foisting an honest-services theory on them. That theory manifestly was submitted to give the jury a reason to convict *apart from* theft, not merely to attach another label to theft. Af-

[Footnote continued on next page]

It is preposterous to claim now that the instructions "effectively required the jury to determine that petitioners' conduct threatened 'foreseeable economic harm' to Hollinger" through a required finding that petitioners were "not 'entirely fair' to Hollinger." Opp. 15 (quoting jury charge). To deem the transaction "entirely fair," the jury needed to find *both* a "fair price" ("the economic and financial considerations") *and* "fair dealing." "[F]air dealing," in turn, includes "disclos[ing]" the transaction to the directors and "obtain[ing]" their "approvals." Pet. App. 236a-237a. Thus, the failure to "disclose[]" the recharacterization of the management fee—*by itself*—kept the APC transaction from being *entirely* fair. Without petitioners' requested instruction, the jury was "effectively required" to *convict* petitioners for obtaining a *lawful* tax benefit in Canada.

The government is left to respond to this clear (indeed, plain) instructional error by treating it as something different: a sufficiency-of-the-evidence problem. It ventures that an audit committee aware that Black and Boultbee stood to pay lower Canadian taxes might have imposed a retroactive reduction in the management fees that Ravelston had *already* earned and the committee had *already* approved. Opp. 15-16 & n.3. Of course, the government—like the court below—can only *speculate* that such collat-

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[Footnote continued from previous page]

ter all, asking jurors to decide separately whether someone who supposedly stole his employer blind was "disloyal" to boot makes as much sense as asking them to consider separately whether such conduct exhibited rather poor manners.

eral consequences *might* have come to pass, because its new theory was never presented to the jury, and the jury was not *asked* to make such findings. One-sided, self-serving speculation about how the jury *might* have viewed evidence and arguments the government *might* have presented had it been required to comply with the majority rule does not remotely meet the government's burden of demonstrating that the *Yates* error was harmless beyond a reasonable doubt.

The circuit split on the scope of honest-services fraud is substantial—so much so that it is arguably "irresponsible to let the current chaos prevail." *Sorich*, slip op. at 6. This case is the ideal vehicle for resolving the split.

III. The Validity Of Judicial Amendments To Rule 30(d) Is Of Surpassing Importance To This Court's Review Function.

The government's answer to the second question yet again suffers from a glaring omission. *Nowhere* does it mention Rule 30(d)'s text, or *any* of this Court's cases holding that judges may not inject additional requirements into procedural rules. Pet. 25-31. This flaw is fatal. Rule 30(d)—which *the government* invokes as the source of requirements for preserving instructional error (Opp. 8-9)—does not even *mention* special verdicts. Small wonder that no court—until now—has enforced the government's forfeiture rule.

Nobody denies that courts occasionally have "relied on" special interrogatories to identify the theory behind a verdict. Opp. 19. The question, though, is whether any *rule* allows a court to *penalize a* defendant with loss of appellate rights merely for *asking*

the trial judge to exercise her discretion to reject the government's request for a special verdict. The cases the government cites do not address *that* question, because until now the courts have *refused* to impose this unauthorized sanction. *See, e.g., United States v. Riccobene*, 709 F.2d 214 (3d Cir. 1983); *United States v. Adcock*, 447 F.2d 1337 (2d Cir. 1971).

Try as it might, the government cannot explain this conflict away. First, it matters not that *Riccobene* dealt with post-verdict interrogatories. Opp. 21. *Pre*-verdict interrogatories pose a heightened risk of improperly influencing the verdict precisely because they are used *before* the verdict. Pet. 25-26. Yet the Third Circuit rejected the government's forfeiture argument even when only the *less* prejudicial version was proposed and resisted. The Third Circuit's ruling plainly also protects petitioners, who objected only to the more prejudicial type of special verdict. The government also notes that in *Riccobene* the prosecution "had not argued that the district court had abused its discretion in denying the [special interrogatories] request." Opp. 21. That does not distinguish this case, because the government affirmatively *withdrew* its special verdict request *before* the court ruled (Pet. App. 228a), rendering *both* of the government's "forfeiture" arguments ironic to say the least.

The conflict with the Second Circuit also persists. As we noted, that court rejects "[a] prosecution's effort to salvage an invalid conviction by faulting the defendant for failing to request interrogatories." Pet. 27 (quoting *Adcock*). The government cites two cases that purportedly change Second Circuit law (Opp. 22), but neither does anything of the sort. In the first, *United States v. Wilkinson*, 754 F.2d 1427 (2d

Cir. 1985), the defendant never asserted *instructional* error—only a (forfeited) sufficiency-of-evidence challenge. *Id.* at 1432. And the more recent decision the government cites specifically *reaffirmed* the relevant aspect of *Adcock*. *United States v. Pforzheimer*, 826 F.3d 200, 206 (2d Cir. 1987) (distinguishing the *Adcock* forfeiture ruling from an unpreserved challenge to *the use* of special verdicts).

Finally, the government's assertion that the issue "has not recurred with sufficient frequency" instills little comfort. Other defendants—though not petitioners—might find it somewhat reassuring that courts outside the Seventh Circuit have read both Rule 30(d) and this Court's cases prohibiting additional, atextual preservation requirements. But, regardless, there *is* a conflict *now*. And in view of the government's unabashed defense of the legality of coercing forfeiture of appellate rights through special verdict requests, there is little reason to believe prosecutors will be any more willing to give up *this* new tool than they have to surrender their vast powers under Section 1346. This Court has a unique institutional interest in heading off the expanded use of this unauthorized forfeiture rule, which greatly enhances the government's prospects for evading review of significant circuit conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500
Counsel for Petitioner Black

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
Counsel for Petitioner Kipnis

April 27, 2009

APPLICATION

No. 08-876

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPLICATION OF PETITIONER BLACK FOR BAIL PENDING APPEAL

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Black

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To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit.

Conrad M. Black applies under 18 U.S.C. § 3143(b) for bail pending appeal of his conviction, following this Court's grant of his petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The primary question presented is whether the mail fraud statute criminalizes an alleged scheme to deprive another of the intangible right of honest services where the defendant did *not* contemplate economic or other property harm to the private party to whom those honest services were owed. An instruction allowing the jury to convict without such a finding of contemplated harm was used on all counts of mail fraud, including the three of which Mr. Black was convicted.

Following the grant of certiorari, the government *consented* to bail for co-petitioner John A. Boultbee based on the *same* substantial question presented in the *same* petition. Ex. A, Defendant Boultbee's Motion on Consent for Release Pending Supreme Court Review and Proposed Order (May 26, 2009). The district court today granted bail based on the government's agreement to release Mr. Boultbee, a non-citizen, from the custody of both the Bureau of Prisons and immigration authorities. Mr. Boultbee will be placed on an appearance bond, signed by a relative, allowing him to return to Canada while the case is pending before this Court. But the government steadfastly refuses to consent to bail for Mr. Black.[1] The only difference between the two petitioners – Mr. Black's conviction of a single count of obstruction of justice – is no reason for a different

[1] Given the parties' firmly held positions on bond, there is no need to require Mr. Black to go through the extra time-consuming steps of burdening the district court and court of appeals (for a second time) only to end up back before this Court arguing that questions to be decided on the merits by *this* tribunal are substantial and likely to lead to a different outcome.

result. As Mr. Black argued in his petition, reversal of the fraud convictions would also require a new trial of the obstruction charge because of the significant prejudicial spill-over from highly inflammatory evidence used on the fraud counts, as well as the flawed "honest services" instruction on those counts which likely contributed significantly to the jury's conclusion that Mr. Black acted "corruptly." Although the government, in opposing certiorari, contended the instructional error had no prejudicial effect on the *mail fraud* verdicts, it never denied that the obstruction charge must be retried if the mail fraud counts are reversed. It is too late for the government to assert otherwise. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985) (requiring non-jurisdictional arguments against a grant of certiorari to be raised "*no later* than in respondent's brief in opposition to the petition for certiorari"); *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009) (noting that failure to dispute an assertion in the brief in opposition "alone is reason to accept this as fact for purposes of our decision in this case"); S. Ct. Rule 15.2. In any event, a sentence on the obstruction count, without more, likely would be only 15 months, and with statutory credit for "good time" Mr. Black has *already* served a sentence of nearly 18 months.[2] He is entitled to bail pending appeal.

STATEMENT

Mr. Black, who is now 64 years old, was convicted by a jury in July 2007 and has been incarcerated for the past 15 months—since March 3, 2008. He is serving a total sentence of 78 months. The length of that sentence was directly determined, under the Federal Sentencing Guidelines, by guilty verdicts on three mail fraud counts. The jury

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[2] While Mr. Black's appeal was before the Seventh Circuit, that court denied him appeal bond based on the length of his sentence for obstruction. As explained below, neither the conviction nor the sentence for obstruction is reason to deny Mr. Black bond pending this Court's ruling.

was allowed to convict on those three counts under either of two theories—conventional fraud by the dishonest taking of another's money, or deprivation of another's right to the defendants' honest services. Ex. B, Petition for Writ of Certiorari, *Black v. United States*, No. 08-876 (Jan. 9, 2009), at 8-10 ("Pet."). Based on the evidence presented at trial, the arguments the government made to the jury, and Mr. Black's subsequent acquittals on several other counts that were grounded in fraud by theft of money, it is almost certain that the jury convicted him under the honest services fraud theory. *Id.* at 11, 22.

The government accused Mr. Black and his co-petitioners of defrauding Hollinger International, Inc. ("Hollinger"), a public company, incorporated under Delaware law, that ran several large newspapers and hundreds of other smaller publications. The jury acquitted on all but three of the twelve fraud counts it considered, necessarily rejecting the government's sweeping theory that petitioners had engaged in a massive scheme to defraud Hollinger of over $60 million. *Id.* at 11. The government's fall-back theory was that petitioners violated their fiduciary duties to Hollinger through disloyalty and dishonesty. The evidence for this theory was that they entered into undisclosed transactions to obtain a lawful tax benefit in Canada, but the proofs also established that they did not do so at the expense of Hollinger. As the government's own star witness explained, petitioners recharacterized a management fee payment—already approved by the Hollinger board—as payment for legally enforceable non-competition agreements. Based on the evidence and the instructions, the jury would have convicted on an honest services theory despite the very strong evidence that petitioners had no intent to deprive Hollinger of money or cause it any economic or property harm.

The sole remaining count of conviction charged Mr. Black with obstructing investigations into his conduct—the same conduct that he has steadfastly maintained (and that a favorable ruling by this Court would help him prove) he had no reason to hide because under the law, as properly construed, he was innocent of all charges. Ex. C, Excerpt of Jury Instructions (June 27, 2007), at Tr 15176-78; Pet. 11-12 n.7.

Mr. Black remained free on a secured bond throughout pre-trial proceedings, trial and sentencing. Ex. D, Order Setting Conditions of Release, No. 05 CR 727 (Dec. 1, 2005); Ex. E, Transcript of Proceedings (Dec. 10, 2007), at 128:24-130:18. He appeared without fail at all proceedings and complied with all conditions of release.

Between verdict and sentencing, the district court denied the government's request to revoke Mr. Black's bail, expressly finding that he was neither a danger to society nor a flight risk. *See* Ex. F, Transcript of Proceedings (July 19, 2007), at 58:21-24 ("I find that under 18, United States Code, Section 3143, that with the conditions imposed by the Court, that there is clear and convincing evidence that Mr. Black is not going to flee"). The court made the same finding after it imposed sentence. Ex. E, Transcript of Proceedings (Dec. 10, 2007), at 128:24-129:4 ("I do find by clear and convincing evidence that Black is not likely to flee or pose a danger to the safety of any other person or the community if he is released under conditions, including the same bond conditions that he has been under"); Ex. G, *United States v. Black*, No. 05 CR 727 (N.D. Ill. Jan. 31, 2008), at 2 ("The Court has previously held that Defendants are not a danger to the community and do not pose a flight risk given their respective bonds"). Indeed, the district court has expressly concluded that "run[ning] and hid[ing]" "would be inconsistent with

everything that I have seen about [Mr. Black's] character during the course of this trial." Ex. F, Transcript of Proceedings (July 19, 2007), at 46:3-5.

When the Seventh Circuit denied Mr. Black bail pending his appeal to that court, it did not take issue with any of these findings. *See* Ex. H, *United States v. Black*, No. 07-4080 (7th Cir. Mar. 3, 2008). Nor, for that matter, did the government. Ex. I, Government's Consolidated Response to Defendants' Motions for Release Pending Appeal (Jan. 29, 2008), at 4 n.1. The court of appeals instead concluded, mistakenly, that Mr. Black's 78-month sentence on the obstruction count would survive, even if the fraud counts were reversed, and that this sentence was "substantially longer than the normal course of an appeal." Ex. H, *United States v. Black*, No. 07-4080 (7th Cir. Mar. 3, 2008), at 2. Because only Mr. Black was convicted of obstruction, he was detained pending appeal while the other defendants (including Mr. Boultbee) were allowed to remain free pending their appeal to the Seventh Circuit.

The court of appeals ultimately affirmed Mr. Black's convictions and sentence. *See United States v. Black*, 530 F.3d 596 (7th Cir. 2008). This Court granted review on May 18, 2009. The Court has informed Mr. Black that his case is likely to be heard in the November or December 2009 argument session.

ARGUMENT

Mr. Black Meets The Statutory Requirements Specified In 18 U.S.C. § 3143(B) For Release Pending This Court's Review Of The Judgment Of The Court Of Appeals.

The primary question on which this Court has granted certiorari is whether the jury's instructions for honest services fraud omitted a qualification that was essential to finding Mr. Black guilty of criminal fraud. Five circuits have explicitly held that a defendant may not be convicted under the honest services provision of the mail fraud statute

for private-sector conduct unless the jury finds that he sought private gain while contemplating economic or property harm to the person to whom his honest services were owed. *See* Pet. 19-21. Under the Seventh Circuit's view (shared by two other circuits), the jury was allowed to convict even though the government's own cooperating witness testified consistently in the grand jury and at trial that the defendants did not intend to take money that was not theirs; rather, they recharacterized the previously approved payments in order to take advantage – in an entirely *lawful* manner – of a Canadian judicial ruling that would lower their tax burden in Canada. *Id.* at 7-10. If this Court ultimately agrees with the majority view, Mr. Black will have served more than two years in prison for conduct that is not a federal crime. Bail pending appeal is needed to avoid that unjust result.

1. Section 3143(b) sets forth the standard for release pending appeal. A defendant is entitled to remain at liberty if a judicial officer, including a Member of this Court, finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released on conditions", and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1).

There was no dispute in the district court or the court of appeals that Mr. Black is unlikely to flee, that he poses no danger to the safety of any other person or the community if released on conditions, and that he pursues his appeal for a legitimate reason and not for purposes of delay. The district court found in Mr. Black's favor on each point, by

clear and convincing evidence, and the government did not contest those issues in the court of appeals. Accordingly, the sole issue is whether Mr. Black has "raise[d] a substantial question of law or fact" likely to result in at least a new trial should he prevail on that question. *Cf.* Ex. G, *United States v. Black*, No. 05 CR 727 (N.D. Ill. Jan. 31, 2008) (noting that only this point was at issue on Mr. Black's motion for bail pending appeal); Ex. I, Government's Consolidated Response to Defendants' Motions for Release Pending Appeal (Jan. 29, 2008), at 4 n.1.

2. The question presented here is "substantial." Most circuits define a "substantial" question within the meaning of Section 3143(b) as a "close" one – one that could very well be decided the other way. *E.g.*, *United States v. Molt*, 758 F.2d 1198, 1200 (7th Cir. 1985); *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (a substantial question is "a 'close' question or one that very well could be decided the other way"); *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985) (adopting the *Giancola* test); *United States v. Randell*, 761 F.2d 122, 125 (2nd Cir. 1985) ("We do not believe that these definitions of 'substantial' differ significantly from each other, but if we were to adopt only one, it would be the language of *Giancola*"); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985) (following *Giancola*); *United States v. Powell*, 761 F.2d 1227, 1231-32 (8th Cir. 1985) (same); *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (same); *United States v. Perholtz*, 836 F.2d 554, 555-56 (D.C. Cir. 1988) (same). "[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues [in a different manner], or that the questions are 'adequate to deserve encouragement to

proceed further'" *United States v. Smith*, 793 F.2d 85, 89-90 (3rd Cir. 1986) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Given the importance of the question presented, the sharp split in the circuits, and this Court's decision to grant review, it is now clear that the question presented is substantial. At least four Members of this Court have implicitly concluded that there are "compelling reasons" for review, such as a conflict between courts of appeals on an important question of federal law. *See* S. Ct. Rule 10. In *Costello v. United States*, a case where—unlike here—the substantiality of the question was established only indirectly, Justice Jackson granted bail pending appeal. *See* 74 S. Ct. 847 (1954) (Jackson, J.) (mem.). Costello had not been granted review in *his* case; rather, the Court granted certiorari in other cases raising the same issue of law. Justice Jackson followed a "necessary inference for purposes of this application . . . that the Court deems a substantial question of general application to exist" in cases raising the issue on which the Court had granted review. *Id.*

Lower courts and Members of this Court have reached the same conclusion under circumstances such as those present here. "It cannot be disputed that defendant is raising a 'substantial' question of law—*i.e.*, one that is 'close' or that 'very well could be decided the other way.'" *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985). "... now that the Supreme Court has agreed to address this very issue." *United States v. McCabe*, 1991 U.S. App. LEXIS 20448, at *4-5 (1st Cir. May 8, 1991). Justice Douglas emphasized why it is not dispositive that the judicial officer considering the application might be disinclined to rule in favor of the applicant on the merits of his appeal:

> [T]he first consideration is the soundness of the errors alleged. Are they, or any of them, likely to command the respect of the appellate judges? It

> is not enough that I am unimpressed. A question may nevertheless be "substantial" if it is novel, or if there is a contrariety of views concerning it in the several circuits, or if the appellate court should give directions to its district judges on the question, or if in the interests of the administration of justice some clarification of an existing rule should be made.

Herzog v. United States, 75 S. Ct. 349, 351 (1955) (Douglas, Circuit Justice).

This case plainly meets those standards. In at least five circuits, a jury must make an essential finding—a finding that was absent here—in order to convict under the honest services fraud theory. It is at least a close question—one on which reasonable-minded jurists could disagree—whether a rule embraced by only three circuits, and rejected by five others due to its impermissibly broad and unpredictable reach, is the right result.

3. Having raised a substantial question, Mr. Black need only show that the likely result of a ruling in his favor is reversal or a new trial. In other words, is the issue sufficiently important to his case that *if he prevails on the merits*, the error would undermine the verdict? *United States v. Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985) ("In deciding whether this part of the burden has been satisfied, the court or judge to whom application for bail is made must assume that the substantial question presented will go the other way on appeal and then assess the impact of such assumed error on the conviction."). For the reasons explained in more depth in Mr. Black's petition for writ of certiorari, the interpretation of the honest services provision employed here was critical to Mr. Black's conviction, and he would likely have been acquitted on *all* counts if the majority view had been applied. Pet. 22-23; Ex. K, Reply Brief for Petitioners, *Black v. United States*, No. 08-876 (April 27, 2009), at 7-10 ("Pet. Reply").

The government, in opposing certiorari, argued that the jury would not have convicted on an honest services theory alone, and—so its argument went—any error in the

instructions was therefore harmless. Ex. J. Brief for the United States in Opposition, *Black v. United States*, No. 08-876 (April 13, 2009), at 15-16. Mr. Black explained in his petition and reply brief why the only fair inference is just the opposite. In other words, the jury very likely rejected fraud by theft and convicted for deprivation of honest services even though the defendants contemplated no economic or other property harm to Hollinger or its shareholders. Pet. 22; Pet. Reply 8. Having considered these competing arguments, this Court granted the petition. And for good reason. The jury's acquittals on the bulk of the fraud counts was a stinging rebuke to the government on its fraud-by-theft theory. On the small portion of the government's case where the jury convicted, the evidence refuting the theft theory was even weightier. The *government* proved through its own cooperating witness that Hollinger's board had approved the payments. The issue on which a real dispute existed was whether Hollinger was deprived of its right to the defendants' honest services. Pet. Reply 8. And that dispute was largely a legal one. The district court resolved that dispute in favor of the government based on the prevailing law of the circuit. The harm from the erroneous instructions is more than serious enough to meet the test for likelihood of reversal or a new trial.

4. The sole remaining question is whether Mr. Black's conviction for obstruction (count 13) requires a different outcome. It does not. As the petition demonstrated, there was serious spillover prejudice from the challenged fraud counts. Pet. 11-12 n.7. The petition further explained why a jury that had been properly instructed on honest services fraud likely would have acquitted on the obstruction count too. *Id.* The government, by not contesting or even mentioning either point, has waived a claim that the obstruction count can be affirmed if the fraud counts are reversed.

The obstruction count was based on the removal of personal papers and effects from Mr. Black's office for safekeeping, during regular business hours, on the eve of his eviction by new management. These materials included copies of documents that were of potential interest to others and had *already* been reviewed extensively by the company's outside investigators. The key issue was whether Mr. Black merely proceeded as any tenant would at the end of his tenancy or, instead, acted "corruptly"—with the improper purpose of "subvert[ing] or undermin[ing] the fact-finding ability of an official proceeding." Ex. C, Excerpt of Jury Instructions (June 27, 2007), at Tr. 15176-78.

As explained in the petition, and summarized further *infra*, a ruling for Mr. Black on the questions presented would also require that the obstruction conviction be reversed. The government has waived any claim to the contrary. Although its brief in opposition asserted multiple reasons why instructional error would not require reversal of the *mail fraud* convictions—including arguments that the claim of error was not preserved—the government chose not to dispute that the obstruction count must fall if the mail fraud counts fall. By not contesting that point, the government waived it. *See* S. Ct. Rule 15.2 (any non-jurisdictional objection to consideration of a question presented based on what occurred in the proceedings below "may be deemed waived unless called to the Court's attention in the brief in opposition"); *Tuttle*, 471 U.S. at 815-16; *Carcieri*, 129 S. Ct. at 1668; *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004) (rejecting, under Rule 15.2, consideration of respondents' argument because respondents failed to identify it in their brief in opposition to certiorari).

Quite apart from the government's waiver, there is at least a substantial question whether the obstruction count must be retried if the fraud counts are reversed, and that is

enough under the bail statute. As the petition explained, a jury finding that Mr. Black had *not* committed mail fraud would have been much more likely to conclude that he *honestly* believed he had nothing to hide—that is, he acted with a clean conscience rather than a corrupt intent. Moreover, the petition documented the serious risk of prejudicial spillover from the mountains of highly inflammatory evidence introduced on the fraud counts. *See, e.g., United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994) (reversing false statements convictions due to risk of prejudicial spillover from evidence that the government introduced on another count for which its theory of guilt was legally flawed).

Even assuming the *absence* of a substantial question as to the fate of count 13, however, Mr. Black is still entitled to bail pending appeal. The statute also provides for release if the likely result of prevailing on appeal is "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b). Mr. Black will have served the likely sentence for the obstruction count alone before the appellate process has run its course.

The court of appeals, in denying Mr. Black bail pending appeal, noted that he received a sentence of 78 months on count 13 alone. *See* Ex. H, *United States v. Black*, No. 07-4080 (7th Cir. Mar. 3, 2008), at 2. But the court of appeals overlooked the fact that, under the required Sentencing Guidelines analysis, the 78-month sentence imposed on that single count was driven almost entirely by Mr. Black's conviction on the fraud counts, not obstruction simpliciter.

The district court calculated the offense level for the fraud counts and separately calculated an offense level for the obstruction count. Because the fraud counts yielded a higher offense level, the obstruction count calculation did not determine the sentence for

that or any other count. Ex. E, Transcript of Proceedings (Dec. 10, 2007), at 40:3-25 (finding a total offense level for the three fraud counts of 28, finding a total offense level for the obstruction count (count 13) of 24, and applying the fraud offense level of 28 because count 13 "is grouped" with the fraud counts).[3] The only effect from the obstruction conviction was indirect and relatively minor. The court imposed a 2-level obstruction enhancement under the calculation of the Guidelines for the fraud counts, *see* USSG § 3C1.1, raising Mr. Black's guideline range minimum from 63 months to 78 months – a difference of just 15 months. Mr. Black has *already* served 15 months. The reason the district court imposed a sentence of 78 months on count 13 is that the Guidelines instruct courts to impose the *total* sentence on each count, with all sentences to run concurrently. USSG §§ 5G1.2(b) (the sentence imposed on *each* count "shall be the total punishment as determined in accordance with" the Guidelines), 5G1.2(c) ("If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently[.]")

The determination of a sentence for count 13, without any underlying fraud offense, would start with an offense level of 14, which yields a guideline range of 15 - 21

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[3] The grouping took place because the fraud calculation included a two-level enhancement, under USSG § 3C1.1, for obstructing the investigation and prosecution of the fraud offense (*i.e.*, the two-level enhancement was based on the conduct that formed the basis for count 13), and also because the Guidelines directed calculation of the *obstruction* offense level based on the seriousness of the underlying *fraud* offenses, whose investigation and prosecution Mr. Black purportedly obstructed. USSG § 2J1.2(c)(1) (directing use of a "cross reference" to a Guideline for another criminal offense if the obstruction "involved obstructing the investigation or prosecution of a criminal offense"). Under the Guidelines, counts are grouped if, as here, one count "embodies conduct that is treated as [an] adjustment to[] the guideline applicable to" other counts. USSG § 3D1.2(c). When counts are grouped under § 3D1.2(c), the offense level applicable to the group is the highest one calculated for the different counts in the group. USSG § 3D1.3(a). As noted, the fraud counts produced the higher offense level.

months. (As noted above, the district court's calculation of level 24 for the obstruction count was premised on Mr. Black having obstructed the investigation and prosecution of fraud offenses.) By the end of the October 2009 Term, Mr. Black will have spent nearly 28 months in federal prison—which equates, with good time credit, to a sentence of 32 months.[4] Even if Mr. Black were to receive a role in the offense enhancement for an obstruction conviction alone, he still will have served the minimum of that range (21 months) well before a decision by this Court reasonably could be expected. And that takes no account of the distinct possibility of a below-Guidelines sentence on the ground that Mr. Black would stand convicted of obstructing an investigation into *lawful* conduct.[5] The obstruction conviction provides no valid basis for denying Mr. Black his freedom while this Court decides whether his convictions must be reversed.

---

[4] With credit under the statute for good behavior (54 days per year, *see* 18 U.S.C. § 3624(b)(1)), the Bureau of Prisons projects that Mr. Black will complete his 78-month term of imprisonment and be placed on supervised release on October 30, 2013. (The release date for any federal prisoner is publicly available at www.bop.gov under "inmate locator.") This means, even ignoring the possibility that up to 10 percent of the end of Mr. Black's term of imprisonment could be spent in community confinement or home detention, he likely would serve close to half of the custodial portion of his sentence before this Court ever rules on the merits.

[5] When the Seventh Circuit denied Mr. Black bail pending its consideration of his direct appeal, the court also noted that Mr. Black received a sentence of 60 months on count 7, a mail fraud count that involved a $600,000 payment. Ex. H, *United States v. Black*, No. 07-4080 (7th Cir. Mar. 3, 2008), at 2. But now that this Court has granted certiorari, a ruling on the merits would require count 7 to be reversed along with the other two fraud counts. The honest services fraud instruction applied to count 7 too. As with the obstruction count—and with the same waiver consequence—the government did not claim in opposition to certiorari that the fraud counts are different for purposes of the legal issue presented.

CONCLUSION

By the time this Court decides his appeal, Mr. Black will be nearly 66 years old and—without the appeal bail that he requests—will have been imprisoned for more than two years. He understands that if he is released on bail and does *not* prevail in his appeal, the completion of his sentence will have been delayed by several months. He is willing to take the chance of prolonging his punishment, though, because if he *does* prevail then the time he will have spent in prison between now and such a ruling can never be returned to him. On the other hand, and as the government has no doubt recognized with respect to Mr. Boultbee, if appeal bail is granted to Mr. Black and the *government* prevails on appeal, society's interest in seeing Mr. Black punished will not be frustrated in the least. Mr. Black therefore asks the Court to enter an order that allows him to enjoy the freedom afforded to his co-petitioner while this Court determines whether their convictions must be reversed. In order to effectuate the release order, the matter should be referred to the district court for the sole purpose of setting the appropriate amount of security for his bond, in light of the government's agreement as to co-petitioner Boultbee, within 7 days of this Court's order.

Respectfully submitted.

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Black
May 28, 2009

ORDER

Supreme Court of the United States

No. 08A1063 (08-876)

CONRAD M. BLACK,

Applicant,

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the applicant, the response filed thereto, and the reply.

IT IS ORDERED that the application of Conrad M. Black for bail pending appeal is denied without prejudice to applicant's refiling his request in the District Court.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 11th
day of June, 2009.

JOINT APPENDIX

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(12)

Supreme Court, U.S.
FILED
JUL 30 2009
OFFICE OF THE CLERK

No. 08-876

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

ELENA KAGAN
Solicitor General
Counsel of Record
DEPARTMENT OF JUSTICE
Washington, D.C. 20530-0001
(202) 514-2217
Counsel of Record for Respondent

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500
Counsel for Petitioner Black

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 9, 2009
CERTIORARI GRANTED MAY 18, 2009

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500

ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201
(214) 698-3100

Counsel for Petitioner Black

MICHAEL E. SWARTZ
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
212.756.2000

Counsel for Petitioner Kipnis

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
v.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
Defendants.	)	

DOCKET PROCEEDINGS

DATE	NUMBER	DOCKET ENTRY
11/17/05	47	FIRST SUPERSEDING INDICTMENT as to Conrad M Black (1) count(s) 1, 5-7,

DATE	NUMBER	DOCKET ENTRY
		8, 9, 10-11, John A Boultbee (2) count(s) 1, 5-7, 8, 9, 10-11, Peter Y Atkinson (3) count(s) 1, 5-7, 8, 9, Mark S Kipnis (5) count(s) 1s-2s, 3s-4s, 5s-7s, 8s, 9s, Ravelston Corporation Limited, The (6) count(s) 1s-2s, 3s-4s, 5s-7s (las,) (Entered: 11/22/2005)
1/10/07	407	SUPERSEDING Information as to Conrad M Black (1) count(s) 1sss, 5sss-7sss, 8sss, 9sss, 10sss-12sss, 13sss, 14sss, 15sss, 16sss-17sss, John A Boultbee (2) count(s) 1sss, 5sss-7sss, 8sss, 9sss, 10sss-12sss, 16sss-17sss, Peter Y Atkinson (3) count(s) 1sss, 5sss-7sss, 8sss, 9sss, 16sss-17sss, Mark S Kipnis (5) count(s) 1ssss-2ssss, 3ssss-4ssss, 5ssss-7ssss, 8ssss, 9ssss, 16ssss-17ssss (emd,) (Entered: 01/11/2007)
01/19/07	434	PROPOSED Jury Instructions by USA as to Mark S Kipnis, Ravelston Corporation Limited, The, Conrad M Black, John A Boultbee, Peter Y Atkinson (Siskel, Edward) (Entered:

DATE	NUMBER	DOCKET ENTRY
		01/22/2007)
02/16/07	471	PROPOSED Jury Instructions by Mark S Kipnis, Conrad M Black, John A Boultbee, Peter Y Atkinson (Safer, Ronald) (Entered: 02/16/2007)
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DATE	NUMBER	DOCKET ENTRY
05/31/07	695	STIPULATION by parties as to Conrad M. Black (las,) (Entered: 06/01/2007)
06/07/07	723	Government's Revised Set of Jury Instructions by USA as to F David Radler, Mark S Kipnis, Ravelston Corporation Limited, The, Conrad M Black, John A Boultbee, Peter Y Atkinson (Siskel, Edward) (Entered: 06/07/2007)
06/11/07	737	Defendants' Position Paper on Use of Special Verdict Forms by Mark S Kipnis, Conrad M Black, John A Boultbee, Peter Y Atkinson (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(Martin, Marc) (Entered: 06/11/2007)
06/12/07	743	RESPONSE by Conrad M Black to response 733 , miscellaneous remark 723 Government's Revised Jury Instructions and Reply to Government's Response to Supplemental Jury Instructions with Respect to Counts 10-12 (Martin, Marc) (Entered: 06/12/2007)
07/13/07	806	MINUTE entry before Judge Amy J. St. Eve as to

DATE	NUMBER	DOCKET ENTRY
		Conrad M. Black: Trial ends- Jury deliberations held. Jury returns it verdict of guilty as to Count I, VI, VII and XIII and not guilty as to Counts V, VIII, IX, X, XI, XII, XIV, XV, and XVI as to the redacted information 766. Court enters judgment consistent with the jury verdict. Defendant signs waiver of forfeiture determination by jury, which is accepted by the Court. Executed Affidavit of Waiver of Extradition in Canada due by 7/27/07. Post Trial Motions due 8/27/07. Responses due 9/17/07, or three weeks from when they are filed, as stated in open court. Replies due 10/1/07. Government's forfeiture position paper is due 8/13/07. Responses due 9/4/07. Replies due 9/14/07. Government's version is due 7/27/07. Defendant's version is due 8/10/07. Cause referred to the Probation Office for a Presentence Investigation. Sentencing set for 11/30/07 at 9:00 a.m. Government's oral motion to revoke bond is entered and

DATE	NUMBER	DOCKET ENTRY
		continued to 7/19/07 at 2:30 p.m. Defendant surrenders passport to the court and is to remain in the Northern District of Illinois until 7/19/07 at 2:30 p.m., or until further court order. Mailed notice (las,) (Entered: 07/18/2007)
09/21/07	904	Government's Consolidated Response to Defendants' Motions for Judgment of Acquittal by USA as to Mark S Kipnis, Conrad M Black, John A Boultbee, Peter Y Atkinson (Attachments: # 1 Exhibit A)(Ruder, Julie) (Entered: 09/21/2007)
11/05/07	928	MINUTE entry before Judge Amy J. St. Eve : as to Conrad M. Black (1), John A. Boultbee (2), Peter Y. Atkinson (3), Mark S. Kipnis (5) Defendant Black's motion for judgement of acquittal and motion for a new trial are denied. Defendant Boultbee's motion for judgment of acquittal and motion for a new trial are denied. Defendant Atkinson's motion for judgment of

DATE	NUMBER	DOCKET ENTRY
		acquittal and motion for a new trial are denied. Defendant Kipnis' motion for judgment of acquittal is granted in part as to Count Seven, and denied as to Counts One and Six. Defendant Kipnis' motion for a new trial is denied. See Memorandum Opinion and Order.Mailed notice (tmh,) (Entered: 11/05/2007)
11/05/07	929	MEMORANDUM Opinion and Order as to Mark S Kipnis, Conrad M Black, John A Boultbee, Peter Y Atkinson Signed by Judge Amy J. St. Eve on 11/05/2007.Mailed notice (tmh,) (Entered: 11/05/2007)
12/10/07	973	Defendant Radler's Position Paper As To Sentencing Factors by F David Radler (Attachments # 1 Exhibit 1 – Plea Agreement # 2 Exhibit 2 – United States v. Miranda # 3 Exhibit 3 – Excerpt of U.S. Sentencing Commission, Statistical Information Packet, Fiscal Year 2006, Seventh Circuit) (Valukas, Anton) (Entered:

DATE	NUMBER	DOCKET ENTRY
		12/10/2007)
01/29/08	1027	RESPONSE by USA as to Conrad M Black, John A Boultbee, Peter Y Atkinson regarding MOTION by John A Boultbee to continue him on release pending appeal 1008, MOTION by Conrad M Black for Bail Pending Appeal 1020 , MOTION by Peter Y Atkinson for Release Pending Appeal 1000 (Attachments: # 1 Exhibit (unpublished decisions))(Siskel, Edward) (Entered: 01/29/2008)
08/21/08	1081	OPINION from the USCA for the 7th Circuit; Argued 6/5/08; Decided 6/25/08 in USCA case no. 07-4080, 08-1030, 08-1072 & 08-1106 : The judgments are affirmed. For further details see order. (las,) (Entered: 08/25/2008)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	March 20, 2007
Defendants.	)	8:15 o'clock a.m.

VOLUME FIVE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

[827]

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

BY MR. CRAMER:

You're sitting in a room with four men who stole $60 million. Four men that betrayed the trust

of thousands of public shareholders. Four men who decided amongst themselves that their six- and seven-figure salaries were simply not enough.

Bank robbers wear masks and use a gun. Burglars wear dark clothing and use a crowbar. But these four – three lawyers and an accountant – dressed in ties and wore a suit. These four, you see, were officers of Hollinger International. It's a newspaper company based here in Chicago.

In 1998, the shareholders trusted these four to sell hundreds of community newspapers -- small community newspapers -- in Canada and the United States.

What the shareholders didn't know was that these four secretly took some of the money from all of those sales of the newspapers for themselves; money that should have gone to the [828] shareholders.

And these four covered up their crime by falsifying documents to make it look to any outside observer that each transaction was a normal business deal.

It wasn't. It was a theft. It was fraud. It was a crime.

* * * * *

[834]

Well, how did they do it? How did they use a Non-Competition Agreement to steal $60 million? It's simple. They lied. They lied. They told the shareholders and the Board of Directors that these buyers of these hundreds and hundreds of community newspapers requested them to sign a Non-Competition Agreement; requested Black and

Radler and Atkinson and Boultbee, all with the help of Mark Kipnis, to [835] sign a Non-Competition Agreement themselves, as well as the company that Black, Radler, Atkinson and Boultbee owned. They just inserted themselves in an agreement and they took money.

* * * * *

[840]

Keep remembering this was the shareholders' money when they sold this business to the public. It's the woman who put Hollinger International stock into her retirement account. That's who owns this company. It's the guy who bought Hollinger International stock and put it into the college fund. That's who owns this company. It's not their company.

MR. GENSON: Objection.

Objection, your Honor, to those characterizations.

THE COURT: Overruled.

You may continue.

BY MR. CRAMER:

It's not their company. It belongs to the shareholders.

And you will see, ladies and gentlemen, that they just take a little piece. They just take the tiniest pieces.

But these are hundreds of millions of dollars in deals. One of these deals was several billion dollars.

I will tell you, what. If you take a little piece from deals that are worth hundreds of millions of dollars and billions of dollars, you can get to 60 million pretty darn quick. And that's what they did.

What's wrong with it? Why can't you take $60 million from a public company that you work for?

Ladies and gentlemen, besides the obvious that it's [841] stealing, these defendants also had a duty. They had an obligation to the shareholders. You'll hear it called a fiduciary duty.

What a fiduciary duty is, is directors and officers have a duty to Hollinger International and its shareholders.

Generally, they must consider the company's and shareholders' best interests. They must not harm the company or its shareholders.

So, they have this duty to the shareholders. And it's a thread. It's a thread that's going to go through this trial -- a fiduciary duty.

And you will see them, ladies and gentlemen, breach that duty time after time after time. The shareholders have a right to expect that the officers -- these defendants -- don't lie to them. They have a right to expect that they are honest with them. At the very least, they can expect not to be lied to -- at the very least.

This duty is not just a day-to-day duty. There's also something that comes into play when a company sells an asset.

Let's say a company sells an asset, like a newspaper, and the officers can benefit from it. All right?

Now you have got a conflict. You have the officers who have a fiduciary duty, but they can benefit from a transaction. That's a conflict.

[842]

You'll hear, ladies and gentlemen, that's called a related-party transaction. A related-party transaction is when a director or officer has a fiduciary duty even when he or she has a personal interest that conflicts with the shareholders' interests.

There's this conflict, right? They've got a fiduciary duty, but they can benefit from a transaction.

And when that happens, it's called a related-party transaction.

And you're going to hear, ladies and gentlemen, that companies -- all companies -- have a process to deal with this conflict. Someone's got to look out for the shareholder because it can't be the officers. They can get some money from the transaction.

And Hollinger International, it's the Audit Committee. It's the Audit Committee. It's the subcommittee of the Board of Directors that is set up to review these; to make sure that the shareholders are given a fair shake; to make sure someone's looking at these transactions; to make sure the shareholders' interests are taken into account and that there's fair dealing.

And you will see that the Audit Committee is made up of what's called independent directors. And you're going to hear that phrase "independent

directors." It, basically, means they're not employees of the company.

[843]

The Board of Directors of International, like the Board of Directors of most companies, have other jobs. They have other responsibilities. At International they got together about four or five times a year to deal with big-picture items. But they relied upon the officers to give them the information.

And the Audit Committee's job is to protect shareholders when the officers or directors have that conflict. They have a fiduciary duty, but there's a conflict. So, the Audit Committee will step in. And they make sure that these related-party transactions are fair for all the shareholders.

Let's look at a Board. Here's (indicating) the process that was set up at International.

I think everyone can see this.

All right. We've got a related-party transaction. You need to give full and accurate disclosure to the Audit Committee, which will then recommend it to the Board for approval.

So, let's step back for a second. Here's where we are (indicating).

These defendants have a fiduciary duty to protect the shareholders. When they can get money from a transaction, you've got this conflict -- this related-party transaction.

Boom, the Audit Committee steps in.

[844]

Full and accurate disclosure is given to the Audit Committee, to the Board of Directors for approval.

And here's the rub (indicating). Here's how they did it (indicating).

Focus on this box (indicating), ladies and gentlemen: "Full and accurate disclosure." Because just like those charts I showed you from Joe's Tavern and the other ones, the defendants are the ones that need to give full and accurate disclosure to the Audit Committee. They didn't. Not once. Not once. Not in any of the deals that you're going to see. Not once did they give full and accurate disclosure.

All right. Keep this (indicating) in mind. Let's dial back to see how they did it.

They go to the buyer. And this (indicating) is the one where they insert the individuals: Black, Radler, Boultbee and Atkinson. They go to the buyer and say, "I know you want International to sign a Non-Competition Agreement. That makes sense. International is selling the newspapers. We're going to give you are ourselves, too."

The buyer says, "Fine."

The price doesn't change.

Now, they've got to go back to the Board of Directors, right? They lied. They give false and incomplete information; and, just like that, they get some money in their pocket.

[845]

And this right here (indicating) is this (indicating). Where they go back to the Board, that's this process (indicating).

And the Audit Committee is relying upon these officers. I told you the Audit Committee trusted these officers.

If the Audit Committee doesn't have the information they need, the shareholders are not protected. And that's where they did it. That was the gap in the system that they exploited.

The Audit Committee -- remember the Board of Directors doesn't go back to the buyers. These are hundreds and hundreds of newspapers. They're not going to go back to the buyers. They trust these defendants. And that's how they got away with it so easily.

* * * * *

[849]

And the best part -- truly the best part -- is that if you're a Canadian citizen -- and Black, Radler, Boultbee and Atkinson are -- and you can get non-competition money, it's tax-free. It's tax-free.

So, not only do they take $60 million from the public shareholders, they didn't pay any taxes on it. That was just a little added benefit. Because you'll hear, ladies and gentlemen, that in Canada you don't have to pay taxes on that. So, you want to get the money out and up; and, if you can call it a "Non-Competition Agreement" versus a "bonus" or "compensation" or "salary" or whatever it is, it's tax-free in hand. And you'll hear that during the course of the trial.

* * * * *

[855]

The two I do want to touch upon just very briefly, you'll see where it says "Forum" and "Paxton" (indicating). Those are two separate deals. Forum is a media company and Paxton is Paxton Media Group.

There were no non-competes signed in those deals. No non-competes. I told you they got bolder and bolder. And the evidence is going to bear that out.

Here at the end (indicating), it's just a money grab. They're just grabbing money. It's 1998, right? The sales are going '98, '99 and 2000. They're selling all these community newspapers. They're almost selling themselves out of work. They've got to grab some money. And that's what they're doing is grabbing money.

So, there's no non-competes for Paxton/Forum; but, you're going to see, ladies and gentlemen, that they cut themselves into the deal nonetheless: 285,000 for Radler and Black (indicating) and 15,000 for Atkinson and Boultbee (indicating). That's all shareholder money. That is all shareholder money.

The other one I want to point out just briefly is APC. APC is American Publishing Company. And American Publishing Company is actually owned by International. It's a [856] subsidiary of International. International owns it all.

American Publishing Company had some newspapers. And what these guys did at the end -- and this is towards the end when they're literally just grabbing for money; this is the one where there's

no newspaper sale -- International already owns this company.

So, what Black, Radler, Boultbee and Atkinson do, with the help of Kipnis, is they sign some non-competition agreements for a transaction that doesn't exist, for a company International already owns. It turns common sense on its head. They literally paid themselves -- they literally paid themselves -- not to compete with themselves, because they worked for International and International owns APC.

No sale and all they do is just sign some Non-Competition Agreements and they cut themselves a check. There was no newspaper sale.

At the end, it's as bold as it can be; but, no one knows. It's bold, but it's simple and nobody knows.

* * * * *

[866]

You're going to learn, ladies and gentlemen, that one way the shareholders learned about what's going on in their company, is what's called SEC disclosures. Companies have to make disclosures to the Securities and Exchange Commission.

And all that is, is it lets the shareholders know what's going on in their company.

The company can buy McDonald's stock, you are not at McDonald's headquarters every day.

How do you learn what's going on? [867] These disclosures (indicating). And the disclosures will tell the shareholders what's happening.

"What were the big transactions in your company?"

"How much money did your company make?"

"What were the related-party transactions in your company?"

"What's going on in your company?"

And you will hear, ladies and gentlemen, that the officers -- the defendants -- gave false disclosures on the non-competes and false disclosures on other things along the way.

* * * * *

[889]

Ladies and gentlemen, we are not here because these [890] guys received $60 million. That's not why we're here. We're here because they stole $60 million.

What's the difference? Honesty. That's the difference. Honesty.

They stole $60 million from the shareholders' pocket and they lied to get away with it. That's why they're here. They stole the money and then they lied to cover it up.

* * * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 05 CR 727
v.	)	Violations: Title 18, United States Code, Sections 1341, 1343, 1346, 1512, 1957, 1962, and 2; Title 26, United States Code, Section 7206(2)
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS	)	
	)	Hon. Amy J. St. Eve

Edited Version

Volume 2
Toronto, Ontario, Canada
Tuesday, January 30, 2007

Continued videotaped Trial Testimony of:
DARREN SUKONICK

* * * * *

[321]

Q Now, in this e-mail, you also talk about -- you talk about the subject of disclosing these non-competition payments; is that correct?

A Yes, we do.

Q Can you, please, read aloud the second paragraph of your e-mail.

A The one beginning, "It would be"?

Q Yes, please?

A "It would be prudent for both HI and HII to disclose all of the previously undisclosed non-comp payments in the 2002 proxy materials (i.e. Osprey payments and U.S. sale non-comp payments in 2000 and 2001.) We could consider aggregating the 2001 and 2000 amounts as follows, (based on the theory that the total amounts were only fixed and finalized in 2001)."

Q And following that paragraph, you drafted a proposed disclosure that Hollinger could make; is that correct?

A Correct.

Q And if I heard you correctly in your [322] testimony yesterday, and I'm not sure that I did – I believe that you said that you prepared this draft detailed disclosure without knowing whether the facts that you put in it were accurate. Is that what I heard you say yesterday?

A We did not know the particulars of these transactions, not having acted on them. So we made an assumption as to the way the transactions had occurred and then provided it for those who knew the facts to confirm them or not confirm them.

Q Right. You said you sent it to people with knowledge of the facts. However, Mr. Sukonick, you sent this to Mr. Atkinson, didn't you?

A Yes, I did.

Q Now, these were transactions which occurred in the United States; is that right?

A Yes, they were, as far as I understood.

Q And as you know, Mr. Atkinson is a lawyer in Canada; is that right?

A Yes, he is or he was then.

Q He is licensed to practice law in Canada?

A That was my understanding at the time.

[323]

Q He was not licensed to practice law in the United States; correct?

A That was my understanding at that time.

Q And isn't it true that you knew that Mr. Atkinson had no role whatsoever in negotiating any of these United States community newspaper transactions? I'll just ask you. Did you know that?

A I did not know that – I did not know whether or not Peter Atkinson had any role in negotiating the transactions. All I knew was that he had received amounts. I'd been told that he had received amounts in connection with them.

Q And this disclosure that you wrote contains information about those transactions, the negotiations of those transactions; is that correct, the U.S. transactions?

A It contains information regarding details of the transactions. I don't know if it refers to the negotiations per se.

Q At the time that you sent this to Mr. Atkinson, you didn't know whether he had any

information about at least some of the details contained in this disclosure; isn't that right?

A I didn't know whether he had the details or not.

Q And when you sent this to Mr. Atkinson, this detailed disclosure, did you say anywhere in your e-mail that you didn't have personal knowledge as to [324] the accuracy of the facts that you were proposing Hollinger disclose?

A I didn't feel it was necessary to do that because --

Q I'm not asking why you did things or why you didn't do things. I'm asking whether in your e-mail to Mr. Atkinson, did you tell him anywhere in this document that you didn't have personal knowledge of the accuracy of the detailed disclosure that you provided? Is that contained in this e-mail?

A No. I didn't think that that was necessary to tell him.

Q So you didn't put it in the e-mail?

A Correct.

Q This e-mail doesn't anywhere say that the detailed disclosure regarding these U.S. Community transactions, you weren't sure about the accuracy of the information. You didn't put that in your e-mail, did you?

A No.

* * * * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 05 CR 727
v.	)	Violations: Title 18, United States Code, Sections 1341, 1343, 1346, 1512, 1957, 1962, and 2; Title 26, United States Code, Section 7206(2)
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS	)	
	)	Hon. Amy J. St. Eve

Edited Version

Volume 3
Toronto, Ontario, Canada
Tuesday, February 6, 2007

Videotaped Trial Testimony of: ELIZABETH DeMERCHANT (Cross-Examination)

* * * * *

[321]

BY MR. SCHACHTER:

Q. Now, with respect to that matter, the disclosure of these CanWest non-competes, you I believe testified about a couple of conversations you had with Peter Atkinson and Jack Boultbee; is that right?

A. That's right.

Q. On April 25th and 26 of 2001?

A. Yes. Those are the dates, yes.

Q. There was a meeting in person on April 25th and a conference call on April 26th?

A. Correct.

Q. And in those meetings generally there was a discussion about whether the CanWest non-compete payments should have been disclosed in the proxy filing that Hollinger had already made; is that right?

A. Correct.

Q. Now, one of the things that was discussed in those conversations was non-compete payments which had been made in other transactions; is that correct?

(Court-ordered Edit)

[322]

THE WITNESS: On August 26th, yes, it was referred to.

BY MR. SCHACHTER:

Q. August? April 26th?

A. April 26th.

Q. So you recall that in this conversation on April 26th there was some discussion about non-compete payments made in other transactions?

A. Yes.

Q. And it is correct, is it not, that in that conversation you have a recollection that Peter Atkinson brought to your attention payments that he had received personally from the CNHI transaction; is that correct?

(Court-ordered Edit)

THE WITNESS: I'm not sure my recollection is that specific. I recall his referring to CNHI, American Trucker. And I recall back and forth on American Trucker. And I know my notes say didn't include Peter Atkinson and Jack Boultbee, although as I think about it the point that was made that Black and Radler were vital would suggest that he had referred to his receiving [323] something. Doing the best to refresh my memory based on the notes which I know that you've looked at.

BY MR. SCHACHTER:

Q. There are some notes that say did not include Peter Atkinson or John Boultbee or something like that?

A. Right.

Q. And those words are right next to the words American Trucker; is that correct?

A. That's correct.

Q. So it's at least possible your notes about "did not include Peter or Jack" referred to the American Trucker transaction?

(Court-ordered Edit)

THE WITNESS: Yes.

BY MR. SCHACHTER:

(Court-ordered Edit)

[324]

BY MR. SCHACHTER:

Q. And by the way, how many times have you met with prosecutors with the U.S. Attorney's office?

A. Three days in 2006, all or part of four days in the last two or three weeks. So, all or part of seven days.

Q. I'm going to specifically ask you about statements that you made to the Government on March 1st, 2006. You recall a meeting that occurred in Chicago at the United States Attorney's office on March 1st, 2006?

A. That would be the third of the three days of last year, yes.

Q. And I will show you Atkinson Exhibit 505. If you could turn to the 10th page, please. And I'll direct your attention to the -- read that paragraph to yourself.

A. Which paragraph?

Q. The paragraph that begins at the top of page 10.

A. "Purchaser for which"?

Q. Yes. If you could just read to yourself.

[325]

A. Okay.

Q. Did you on March 1st, 2006 tell the prosecutors with the U.S. Attorney's office that regarding CNHI he, Peter Atkinson, Jack Boultbee and others had received non-compete payments?

(Court-ordered Edit)

BY MR. SCHACHTER:

Q. Did you say that to the prosecutors on March 1st, 2006?

A. I must have done. I have no reason to think this is a bad note.

Q. So you believe that you did say to the prosecutors at that time that in this meeting Mr. Atkinson said, regarding CNHI, he, Jack Boultbee and others had received personal non-compete payments?

A. Right.

Q. That he had brought that to your attention at this meeting on April 26th, 2001?

A. Correct.

* * * * *

[416]

Q. Exactly. And you testified yesterday, or the last day you testified that you were told about other deals where non-compete payments were made to individuals at that April 25th meeting, correct?

A. Or the 26th I think, correct.

Q. And there was back and forth about American Trucker, whether American Trucker had individual payments, but with regard to all of the others you were given the information that there

were [417] payments to individuals for non-competes?

A. On April 26th I was given information. I don't have an independent recollection of what was said, but for the notes which we've all seen and I've tried to use to refresh my memory as best I can.

Q. Okay. And the present state of that is that you knew that there were other transactions that had non-compete payments to individuals that had not yet been disclosed as of May 1, 2001, correct?

A. I think you can knit all that together, yes.

Q. But at the time you were drafting this disclosure in the 10-Q those other transactions did not come to your mind, did they?

A. They did not.

Q. You just didn't think about it.

A. I didn't think about them. I wasn't familiar with them, not having acted on them. I didn't know how large they were. I had asked for Jen to check the record in the hopes I could find something to crib frankly for the Board memo I was working on. When the answer came back that she couldn't find anything it was gone from my memory. It was not weighing on my mind when I [418] sat down to do this draft disclosure, correct.

Q. And by the way, the size of it wouldn't bear on whether or not it was a related party transaction, correct?

A. No, it would go to the materiality.

Q. And you just didn't know one way or the other.

A. I didn't know except for some percentages that I would have seen in the September material, and then there's a cryptic reference to 2.5 percent of 70 million in my notes. I don't know whether I did the math. That's all I knew.

Q. You knew -- right. And you didn't find out?

A. No, I didn't.

Q. You just simply didn't connect the dots, as you put it.

A. That's fair.

Q. And you weren't trying to hide anything.

A. No. No.

Q. You weren't trying to be deceitful.

A. No.

[419]

Q. You weren't trying to defraud anybody, right?

A. Right.

Q. You just missed it.

A. "Missed" suggests I should have connected the dots, but look --

Q. You didn't.

A. I didn't.

* * * * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois March 21, 2007
Defendants.	)	1:30 o'clock p.m.

VOLUME SIX
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of Gordon Paris

[1306]

Q. In 2002, what were the management fees paid by Hollinger International to Ravelston to manage the company?

A. 24.8 million.

Q. And, in 2003, what were -- what was -- the amount paid by Hollinger International to Ravelston to manage the company?

A. 26 Million.

Q. And, sir, what was supposed to be included within these management fees?

A. The management fees paid for the full services of those individuals. Their compensation was intended to be paid by Ravelston, not directly by the company. And these fees were to cover all the management services to be provided by senior executives and a back office group that provided accounting and financial support.

Q. When you say the compensation of these individuals, are you referring to salary and bonus?

A. Yes.

Q. Were the Ravelston managers -- defendants Black, Boultbee and Atkinson -- were they also paid compensation for the services that they provided to Hollinger International directly as managers?

A. No, they were not. The exception was Mr. Black did receive a salary as the Chairman of the Telegraph, which offset the numbers that were paid directly to Ravelston.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	March 22, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME SEVEN

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of Gordon Paris

[1340]

Q. I'm going to show you what's in evidence as Government Exhibit Summary 1.

* * * * *

[1342]

BY MR. SUSSMAN:

Q. Mr. Paris, does this exhibit fairly and accurately summarize payments made to Hollinger executives and Hollinger-related entities between May of 1998

and April of 2001, that were characterized as non-compete payments?

A. Yes.

Q. And the amounts that are here (indicating), where do those amounts -- where do those dollars -- actually come from?

A. The payments came either directly from the purchasers of the assets or out of -- or from Hollinger International.

Q. So, do those payments come from the purchase of Hollinger assets?

A. The purchase -- yes, these involve the sale -- or some of them involve the sale -- of Hollinger International assets; and, in certain instances, monies flowed directly from the purchasers to these individuals.

The other source of the money for these payments characterized as non-competes came from Hollinger International.

* * * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	March 27, 2007
Defendants.	)	1:30 o'clock p.m.

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of Lloyd Case

[2319]

Q. Mr. Case, when you embarked on the negotiation to buy the Jamestown Sun from Hollinger

International, did you request a Non-Compete Agreement as part of that transaction?

A. No.

Q. Why not?

A. We just didn't think it was an issue. There was -- in our mind, it didn't -- we weren't concerned that Hollinger would come back into Jamestown, North Dakota, and start another business.

I also understood that they were liquidating a lot of their newspapers and probably not interested in expanding their operation.

[2320]

MS. RUDER: If we could put back up Government Exhibit Forum 9-A, the map we were looking at before.

BY MS. RUDER:

Q. Mr. Case, at the time you were negotiating the transaction -- focusing on Stutsman County, in particular -- did you have any concerns about Hollinger International coming back into that community and competing with Forum if you bought the Sun?

A. No, I did not.

Q. And is that for the reasons that you've just described to the jury?

A. Yes.

Q. Now, when Forum bought the Jamestown Sun, from what company did you buy it?

A. Hollinger International.

Q. As of the year 2000, were you familiar with a Canadian company called Hollinger, Inc.?

A. No.

Q. Did you know what relationship there was, if any, between Hollinger International on one side and the Canadian company Hollinger, Inc., on the other?

A. No, I did not.

Q. Did you have any concerns about the Canadian company Hollinger, Inc., going back into Stutsman County and competing with you?

[2321]

A. No.

Q. In your discussions with Hollinger and its representatives, did you ever request that any Hollinger company or person sign any Non-Compete Agreement with Forum Communications?

A. No, I did not.

Q. And, in particular, Mr. Case, let me ask you specifically, did you ever request that the Canadian company Hollinger, Inc., sign a non-compete with Forum?

A. No.

Q. Was that something that was important to you?

A. No.

Q. Did you care?

A. No.

* * * * *

[2334]

Q. We talked about the purchase price for this deal being $14 million; is that correct?

A. Yes.

Q. Did Forum Communications Company pay any more money to Hollinger International in exchange for its agreement not to compete in these counties?

A. No, we did not.

Q. Did Forum pay any more money for the agreement of the Canadian company Hollinger, Inc., not to compete in these counties?

A. We did not.

Q. Would you have even considered paying money for that agreement not to compete?

A. No.

Q. Why not?

A. Once again, it was not a threat. It was not a threat to us. We already made the $14 million offer. It was accepted. There was no need to pay any more money. And we didn't – we [2335] didn't -- require a non-compete.

Q. Mr. Case, if you didn't want a non-compete from Hollinger International or Hollinger, Inc., why did you agree to go ahead and sign a contract that had them in as parties?

A. If anyone volunteers a non-compete, it would be silly not to take it. I mean, we didn't -- we didn't -- require it, didn't think we needed it; but, if somebody offers it, I'd take it. I'd take it – if there were 12 of them, I'd take them. It doesn't – doesn't -- matter.

Q. Would you have done the deal, anyway?

A. Yes.

Q. Would you have closed the deal, anyway?

A. Yes.

Q. Was doing this deal for you conditioned on anyone signing a non-compete with Forum Communications?

A. No.

* * * * *

[2339]

Q. Did you enter into non-compete agreements with any of those four men as part of this deal?

A. No.

Q. Did you request non-competes from them?

A. No.

Q. Did you care about non-competes from them?

A. I did not care.

Q. At any point in your negotiations with Hollinger International, did you request that money from the deal go to Mr. Black, Mr. Radler, Mr. Boultbee or Mr. Atkinson?

MR. SCHACHTER: Objection.

BY THE WITNESS:

A. No.

MR. SCHACHTER: Relevancy.

THE COURT: Overruled.

* * * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	March 27, 2007
Defendants.	)	1:30 o'clock p.m.

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

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Direct Examination of David Paxton

[2419]

Q. How did Hollinger, Inc. get into this agreement?

A. It was proposed by Hollinger that the Non-Competition Agreement, both the amount of the Non-Competition Agreement and the allocation to

Hollinger and to Hollinger, Inc. and, in fact, the inclusion of Hollinger, Inc. was all suggested by Hollinger.

Q. So the inclusion of Inc. was suggested by Hollinger, and you said the allocation amount also was?

MR. GENSON: Objection, leading. He's repeating the answer as part of the new question. I object to that.

THE COURT: Objection to leading is sustained. He can certainly use part of the answer as a transition into the next question.

BY MR. CRAMER:

Q. You said the allocation was also suggested by International. What are you talking about, the allocation?

A. The allocation of 75 percent of the $2 million non-compete to Hollinger and 25 to Inc., and, in fact, the fact that 2 million of the 59 million was being allocated, all of that was proposed by Hollinger.

Q. You already told us you didn't negotiate the $2 million. Did you negotiate at all the percentage split between International and Inc.?

A. No, we did not.

Q. Why not?

[2420]

A. It did not matter to us. It did not affect us.

Q. Why didn't it matter?

A. We were going to pay $59 million whether this was two million or two-and-a-half or one-and-a-half. So it did not affect our total cost.

The amount that was allocated to the non-compete agreement did not have a tax impact or other impact on us, so it did not matter to us.

Q. Would you have paid $59 if Inc. was not in that section?

A. Would we have paid $59 million?

Q. If Inc. was not in that section?

A. Yes, we would have.

* * * * *

[2434]

Q. At the time of the closing -- actually, let me back up for a minute.

The day before the closing, you talked before that you knew who Conrad Black was. The day before the closing, did you request that Conrad Black be included in the Non-Competition Agreement?

A. No, I did not.

Q. Why not?

MR. GENSON: Objection as to why not. He didn't do [2435] it, and no one asked him to do it. It's speculation, Judge.

MR. CRAMER: Judge, it's not speculation. He is the president and CEO of Paxton Media Group. There was obviously a reason that he didn't.

MR. GENSON: There's a whole lot of other people he didn't include. You going to ask about all of them, too?

MR. CRAMER: Only these three are relevant, Judge.

MR. GENSON: No, Judge, I object.

THE COURT: Mr. Genson, let him finish.

MR. CRAMER: If I may, Judge, the government's theory --

MR. ROMANO: Your Honor, do we have to have this --

MR. CRAMER: I'll be short. I'll truncate it, Judge. This is relevant given the government's theory, Judge.

THE COURT: The objection wasn't relevance. It was speculation.

Overruled on speculation. You may answer. Do you need the question?

BY MR. CRAMER:

Q. Why didn't you want Conrad Black inserted in the Non-Competition Agreement?

MR. GENSON: Objection. He didn't say he didn't want him inserted. He never asked.

BY MR. CRAMER:

Q. Why didn't you ask for Mr. Black in the Non-Competition [2436] Agreement?

A. We did not feel that we needed a Non-Competition Agreement with Conrad Black.

Q. The day before the closing, did you request that Jack Boultbee be included in the Non-Competition Agreement?

MR. NEWMAN: Objection.

THE COURT: What's your objection?

MR. NEWMAN: Relevancy, your Honor.

MR. CRAMER: I'll truncate it, Judge, given the government's theory and the payments, it's highly relevant.

MR. GENSON: I object --

MR. NEWMAN: I object to the government's theory. I have a theory also, Judge, I'd be more than happy to --

THE COURT: Mr. Newman –

MR. NEWMAN: -- state it to the jury and get another opening.

THE COURT: Mr. Newman, he didn't state his theory. The objection is overruled. You may answer.

BY MR. CRAMER:

Q. I'll ask it again. Did you request -- the day before the closing, did you request that Jack Boultbee be included in the Non-Competition Agreement?

A. No, I did not.

Q. Why not?

MR. NEWMAN: Objection, Judge.

[2437]

MR. CRAMER: I'll stand -- I'm not sure what the basis is, but if it's relevance --

THE COURT: What's your basis?

MR. NEWMAN: Relevancy.

MR. CRAMER: If it's relevancy, I'll stand on my prior answer.

THE COURT: Objection overruled. You may answer.

BY MR. CRAMER:

Q. Why didn't you request the day before the closing that Jack Boultbee be included in the Non-Competition Agreement?

A. We did not believe we needed a Non-Competition Agreement with Jack Boultbee.

Q. The day before the closing, did you request that Peter Atkinson be included in the Non-Competition Agreement?

MR. HOCHMAN: Objection, your Honor, foundation.

MR. CRAMER: Foundation? Foundation?

MR. HOCHMAN: He hasn't stated he even knows who Peter Atkinson is, your Honor.

THE COURT: Objection overruled. You may answer.

BY THE WITNESS:

A. We did not.

BY MR. CRAMER:

Q. Why not?

A. We didn't feel we needed it.

Q. Let's go to the day of the closing. The day of the [2438] closing, did you know who Peter Atkinson was, sir?

A. No.

Q. Did you know his title, what he did for a living?

A. No.

Q. Did you know if he had any relationship whatsoever to Hollinger International?

A. I did not know.

Q. The day of the closing, did you know who Jack Boultbee was?

A. No.

Q. Did you know what his title was?

A. No.

Q. Did you know what the man did for a living?

A. No.

Q. Do you know whether or not Jack Boultbee had anything to do with Hollinger International?

A. I didn't know.

Q. Mr. Paxton --

MR. NEWMAN: Your Honor, at this time, in light of the gentleman's answers not knowing, then I respectfully submit to you that the questions being asked of him about his request or non-request of Jack Boultbee is now academic and should be stricken because he's now indicated he doesn't even know if he exists.

THE COURT: Objection overruled.

[2439]

BY MR. CRAMER:

Q. Just a few more questions, Mr. Paxton.

Was it a condition of closing that Conrad Black sign a Non-Competition Agreement?

A. No.

Q. Was it a condition of closing that Peter Atkinson sign a Non-Competition Agreement?

A. No.

Q. Was it a condition of closing that Jack Boultbee sign a Non-Competition Agreement?

A. No.

* * * * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	April 4, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTEEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of Frederick Creasey

[3045]

Q. Now, you also said that you sent drafts to management; is that right?

A. Yes.

Q. First of all, tell us who you're referring to when you use the term "management"?

A. To Mr. Kipnis, to Mr. Boultbee -- depending what year it was, but in the later years, to Mr. Kipnis, to Mr. Boultbee -- to Mr. Atkinson, Mr. Smith, Mr. Healy.

That's who comes to mind. There may be more.

Q. Why would you send drafts of these reports to management -- to the people that you just described?

A. To make sure I had not omitted anything from the draft. Maybe something needed to be stated in a slightly different way or to check the completeness and accuracy of it.

Q. In terms of the completeness and accuracy of the information, were you personally aware of the business that was being conducted by the company from quarter to quarter and year to year? Was that part of what you did as a controller?

A. Well, I was aware of what I was aware of, yeah.

Q. And that's what I'm asking you, sir.

In terms of what you were aware of, were you actually **[3046]** out in the field negotiating deals?

A. No.

Q. Were you negotiating with buyers of newspapers, for example?

A. No.

Q. In terms of making sure that information was accurate and complete, who was in the best position

to know whether deals were being described accurately?

MR. SCHACHTER: Objection, your Honor.

MR. TUITE: Objection to speculation, Judge.

THE COURT: Sustained.

Rephrase.

BY MS. RUDER:

Q. Why did you send these drafts to the management?

MR. SCHACHTER: Objection. Asked and answered.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. Sorry, could you repeat the question?

BY MS. RUDER:

Q. Yes.

Why was it that you sent your drafts to the managers?

A. I wanted everybody to -- I wanted all the managers to -- make sure I addressed and described the transactions appropriately.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	April 4, 2007
Defendants.	)	1:30 o'clock p.m.

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

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Direct Examination of Frederick Creasey

[3093] Q. And why were you seeking comments from, for example, Mr. Atkinson and Mr. Boultbee concerning the 10-K – this draft 10-K?

A. Sorry. I thought somebody said something.

I was looking for -- for -- them to read and ensure a completeness and accuracy of what I was including in the 10-K.

Q. Now, in particular as to Mr. Kipnis, did you later receive an e-mail from him confirming that he had received the drafts?

A. Yes.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois April 8, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FIFTEEN
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY
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Cross-Examination of Frederick Creasey

[3606]

Q. And can you please tell us, what is the Management Fee Accrual Account?

[3607]

A. It would represent -- as best as I can recall, there were management fees that had not yet been paid by American Publishing -- or sorry, Community Group -- to Ravelston.

Q. And if I understand your testimony, sitting here today, asking you about communications that may or

may not have occurred in February of 2001 -- more than six years ago – you don't have a memory of Mr. McBride in February of 2001, discussing a proposal with you to charge the $5.5 million against the Management Fee Accrual Account; is that correct?

MS. RUDER: Objection to form.

THE COURT: Sustained.

BY MR. SCHACHTER:

Q. Mr. Creasey, do you remember the -- Roland McBride's proposal that he referenced in his November 6th, 2003, memo to you?

A. Not specifically, no.

Q. Now, you know, do you not, that the checks -- the $5.5 million in payments -- were cut from American Publishing Company; is that correct?

A. I believe that's correct, yes.

Q. But in the accounting records, that payment of $5.5 million in February of 2001 did not reduce -- they weren't charged against the Management Fee Accrual Account; is that correct?

A. Did you say they weren't charged?

[3608]

Q. They were not.

A. They weren't.

Q. Right.

The payment of $5.5 million from American Publishing Company in February of 2001, it didn't happen. It wasn't charged against the Management Fee Accrual Account. Nobody did that?

A. That's correct.

Q. And, so, this $5.5 million was paid; is that correct?

A. I --

Q. Well, $5.5 million was paid to executives from APC in February of 2001; is that correct?

A. Yeah. I learned that later, yes.

Q. And -- but the -- whatever was left from the Management Fee Accrual Account, that was also paid in the form of management fees; is that correct?

MS. RUDER: Objection. Foundation.

THE COURT: Sustained.

BY MR. SCHACHTER:

Q. Do you know that in your role as -- do you know from your understanding of the books and records of Hollinger that $5.5 million in management fees --

MR. SCHACHTER: Well, withdrawn. Withdrawn.

BY MR. SCHACHTER:

Q. In any event, the $5.5 million was paid to executives in [3609] February of 2001 and nobody charged it against the Management Fee Accrual Account; is that right?

A. That's correct.

Q. And that means that whatever was shown as being owed in management fees to Ravelston, that still reflected that it was owed in management fees to Ravelston?

Nobody made a record showing that it wasn't owed any more; is that correct?

MS. RUDER: Judge, I object. Assumes facts not in evidence.

THE COURT: I am going to sustain on form.

BY MR. SCHACHTER:

Q. Maybe we'll just leave it at: Nobody charged this $5.5 million in payments against the Management Fee Accrual Account, right?

A. Right.

Q. To the extent Roland McBride had a proposal to charge the payment of $5.5 million from APC against the Management Fee Accrual Account, it wasn't done?

A. It wasn't done.

Q. And the full amount of management fees that was owing for 2000 was paid; is that correct?

A. Yeah, I have no knowledge that it was paid, but I have no reason to doubt that it wasn't paid.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	April 9, 2007
Defendants.	)	1:25 o'clock p.m.

VOLUME FIFTEEN
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY
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Redirect Examination of Frederick Creasey

[3766]

BY MS. RUDER:

Q. In terms of the disclosure that's made concerning this CNHI II, APC and supplemental payments, I've got some questions about the other parts of the disclosures.

First of all, the first part of that second paragraph states, "In connection with the sales of United States newspaper properties in 2000." Do you see that?

A.. Yes.

Q. Does that disclosure language cover the $9.5 million in the CNHI II transaction that we just looked at on the chart?

A.. Yes.

Q. And in particular, does that include the $4.3 million that was paid to Conrad Black?

A. Yes.

Q. Does the language "In connection with the sales of United States newspaper properties in 2000" apply likewise to the payments that were made to Mr. Radler, Mr. Boultbee and Mr. Atkinson?

A. Yeah.

Q. Now, the second payments that you said made up the $15 million were these APC payments of five-and-a-half-million dollars, is that correct?

A. Yes.

Q. Does the language "In connection with the sales of United [3767] States newspaper properties in 2000" apply to that APC payment?

A. No.

Q. Why not?

A. There were no sales of -- that transaction was not a sale of properties.

Q. I'm sorry, what transaction was not a sale of properties?

A. There was no sale attached to the APC non-compete.

Q. Where in the disclosure does it say that, Mr. Creasey?

A. It doesn't.

Q. In terms of what is being described to the shareholders in this 10-K, are the shareholders being told that the five-and-a-half-million dollars that's rolled into the 15 million did apply to a sale of United States newspaper properties?

A. Yes.

Q. Was that accurate?

A. No.

* * * * *

[3769]

Q. And does the same disclosure cover these APC payments that were made?

A. Yes.

Q. Now, while we're on the APC payments, the statement here is that the APC -- and, again, there's no specific reference to the APC payments in the disclosure, is that correct?

A. That's correct.

Q. But based on what you've looked at, you know that that's included within the $15 million, is that fair?

A. That's correct.

Q. My question to you, Mr. Creasey, is were the APC payments of $5.5 million actually paid out in 2000 as described in this disclosure?

A. Physically paid?

[3770]

Q. Yes.

A.. I don't believe so, no.

Q. When -- when was that money paid out?

A. I think the checks were drawn, from memory, in February of 2001.

Q. The checks were actually paid out in February of 2001?

A. I believe so, yes.

Q. Is that described in this disclosure?

A. No.

Q. Were the shareholders told in the 10-K that those checks were backdated to December of 2000?

MR. NEWMAN: Objection to the form of that question.

MR. SCHACHTER: Objection.

THE COURT: Sustained.

BY MS. RUDER:

Q. What, if anything, does the disclosure say concerning how the checks were dated, Mr. Creasey?

A. It doesn't.

Q. And what, if anything, does the disclosure tell the shareholders about when this $5.5 million was actually paid out?

A. It doesn't.

Q. What, if anything, were the shareholders told about why this $5.5 million was being paid to the executives?

A. It says they're a non-compete to satisfy closing [3771] condition.

* * * * *

[3781]

Q. Did you see any documentation at all showing that the Audit Committee knew about or had approved these APC payments of $5.5 million?

A. No.

* * * * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	April 16, 2007
Defendants.	)	1:45 o'clock p.m.

VOLUME NINETEEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

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Direct Examination of William Rogers

[4232]

Q. You told us before you had another conversation with Mr. Kipnis. We talked about one.

What's the next conversation you had with Mr. Kipnis?

A. I believe it was the next day, which would have been Saturday, the 21st.

Q. Okay. Tell us about that. Where were you when you had this conversation?

A. My recollection is that I was at home, and I believe I called him. And we then -- between the first conversation where he explained to me about Torys' advice and sent me this e-mail and the next day, Saturday, we'd spent the time, you know, I'll say reflecting and analyzing the disclosure question so that based on the facts we then had -- we realized we didn't necessarily have all the facts -- to try and come to our own independent view as to what we thought.

And our conclusion was, and I communicated to Mark, that we didn't think this was a close call. We thought these payments needed to be disclosed, were required to be disclosed.

Q. You say you didn't think this was a close call. Is that what you said to Mr. Kipnis?

A. That's an exact quote. That's what I recall saying, yes.

[4233]

Q. And when you say this is not a close call, what are you referring to?

A. The question whether these should be disclosed.

Q. Why wasn't it a close call, in your opinion?

A. Because we thought that -- we concluded that these payments -- again, based on the facts that we then had, and we weren't presupposing that we necessarily had all the facts and there could be other

facts that, you know, could change our view, but based on the facts we had --

MR. SAFER: So, your Honor, I object as no foundation. Number two, this is not what he said anymore. This is his own unexpressed mental process.

THE COURT: Mr. Cramer?

MR. CRAMER: That's fine. I'm going for the conversation itself, Judge.

THE COURT: Sustained.

Mr. Rogers, listen to the question and please just answer the question that's posed. I know you're a lawyer and it's very hard for lawyers sometimes, but just answer the question that's posed.

BY MR. CRAMER:

Q. Let's go back to that second conversation with Mr. Kipnis, April 21st. That's the the one you said was not a close call. What else did you say to Mr. Kipnis?

A. I don't recall -- I don't recall anything else [4234] substantively that I said to him.

Q. Do you remember anything substantively that Mr. Kipnis said to you?

A. No.

Q. After you had the conversation with Mr. Kipnis and relayed to him your opinion, Cravath's opinion that this was not a close call, was there any doubt in your mind that Mark Kipnis understood the seriousness of the disclosure issue?

MR. SAFER: Well, I object to what this witness thinks is in Mark's mind.

MR. CRAMER: Based upon the conversation he had.

MR. SAFER: Based upon whatever. I object to him opining about what's on Mark's mind. The jury --

THE COURT: Sustained as to the form of the question. If you can rephrase, go ahead.

BY MR. CRAMER:

Q. After you told Mr. Kipnis that this was not a close call, did he argue with you on that point?

A. He did not, and I mean I used that phrase to convey the strength of our view.

* * * * *

[4245]

Q. Tell us what happened in the conversation.

A. Okay. I began the conversation by describing to Peter what our conclusion was, having spent now even more time – in other words, it's sometime after April 23rd and before the 15th of May -- looking at the SEC requirements, looking at the facts that we had been given by Hollinger.

Our conclusion was that these payments were required to be disclosed and that the failure to disclose them made the proxy disclosure, which was also incorporated by reference and, therefore, legally part of their annual report on Form 10-K, you know, defective, false or, you know, containing a potentially material mistake.

Q. Now, did you relay that to Mr. Atkinson?

A. I did.

MR. SAFER: Your Honor, I'm going to ask for a limiting instruction with regard to this testimony.

MR. MARTIN: We would join in that request.

MR. CRAMER: That's fine.

THE COURT: Ladies and gentlemen, the testimony that **[4246]** you're hearing now is testimony with respect to Mr. Atkinson only.

BY MR. CRAMER:

Q. I asked you if you relayed this to Mr. Atkinson. Did you?

A. Yes.

Q. Now, is that -- did you relay to him the consequences of what could happen with a faulty disclosure?

A. Yes.

Q. Tell us what you said to him.

A. Well, what we said to him was that because the disclosure in the proxy statement, which formed part of the 10-K, was in our view potentially defective, it established the potential for liability to any number of potential plaintiffs, including shareholder suits potentially brought under Rule 10b5, the common rule under which shareholder class action suits are brought.

Q. I don't want to get into specifics of 10b5, but you mentioned that before. Is that the same section under the SEC rules?

A. That's correct.

Q. How long was this conversation approximately?

A. I remember it as being a long-ish conversation. I believe it was somewhere in the half hour, 45 minutes, perhaps as long as an hour, but, you know, somewhere in that range.

Q. Did Mr. Atkinson respond to either you or Mr. Saunders in [4247] that conversation?

A. Yes.

Q. Tell us what he said.

A. I recall Peter having said that he would need to discuss this matter with Conrad, Conrad Black, and explain to him and persuade him of the need to disclose this.

Q. Now, you mentioned Mr. Saunders's area of expertise is litigation.

A. Correct.

Q. Is it specifically litigation related to shareholder work?

A. Well, he does -- Paul should state his own capabilities, but yes.

Q. As far as you knew, though.

A. Yes.

Q. Why did you have him on the phone call?

A. As I said, he was familiar with Hollinger, and, therefore, he was -- I wanted to have a litigator because I felt this was a potential litigation matter, and he was, in my view, the proper litigator.

Q. I'd like to draw your attention to CanWest 60 in your binder.

MR. CRAMER: Judge, at this time, I would offer CanWest 60. I believe there is a stipulation as to Mr. Atkinson. Is that correct?

THE COURT: Yes. The government -- the Court will [4248] admit Government Exhibit CanWest 60 consistent with the Court's prior rulings.

And, ladies and gentlemen, this document, CanWest 60, is being admitted only against Mr. Atkinson. You are not to consider it in your deliberations with respect to any of the other defendants.

(Government Exhibit CanWest 60 received in evidence.)

MR. CRAMER: And, Judge, if I may, there is a stipulation that this is Mr. Atkinson's notes, right?

MR. SCHACHTER: That's correct, your Honor. This is Mr. Atkinson's handwriting.

MR. CRAMER: Thank you.

May I publish?

THE COURT: You may.

BY MR. CRAMER:

Q. Can you see that, sir?

A. Yes. I have a hard copy in front of me.

Q. Okay. These are Mr. Atkinson's notes. It's dated May 9, 2001. Is that consistent with your memory as to when the conversation happened?

A. That seems about the right date.

Q. You had --

A. My diaries don't indicate specifically that it occurred on that date, but that seems about the right date.

Q. You see on the left "Bud Rogers and Paul Saunders." That [4249] was who was involved in the conversation, the two of you?

A. Yes.

Q. It says "Rule 404" on the left. What is that?

A. That's a reference to the SEC rule that requires disclosure of transactions with affiliates.

Q. And it says not -- is that "not a defensible position" on top?

A. Correct.

Q. What does that pertain to?

A. I believe those were words that I stated at the outset of the conversation, that I stated to Peter that I did not believe that nondisclosure of these payments was a defensible position.

Q. And you're clear that you stated that to Mr. Atkinson?

A. That's my recollection.

Q. And then it says where you see that "Rule 10b5," and to the right of it, "issue is whether an obligation to say anything."

What does that mean?

A. I think that's -- well, the question raised under 10b5 is whether there's an obligation to say anything based on the prior disclosure.

Q. Does the obligation to say anything change if there was a prior disclosure?

A. Well --

[4250] MR. SCHACHTER: Your Honor, I'll object. That does call for a legal conclusion.

I also object to the witness interpreting the notes. It's one thing to report what he recalls. It's another thing for him now to interpret Mr. Atkinson's handwriting.

MR. CRAMER: Judge, I'm not asking for an interpretation. With regard to the legal opinion, I'm not characterizing Mr. Rogers as an expert. However, he is Hollinger International's lawyer who was giving advice. Just as we heard other advice, I think this is relevant.

THE COURT: Again, you need to -- I'll sustain the objection. You need to make it clear that that's something he's conveying to the defendant.

And then in terms of these notes, they're not his notes. I'm not sure if he's ever seen them before. I do think you need to be careful how you're phrasing your questions.

BY MR. CRAMER:

Q. Let's -- did you explain to Mr. Atkinson anything about disclosing the CanWest transactions and whether there was an obligation to disclose it completely?

A. What I recall saying to Peter in connection with Rule 10b5 was that the question to be analyzed, the legal question to be analyzed is whether there's an obligation to say anything when you have an existing disclosure that you discover is [4251] incorrect.

Q. What did you tell Mr. Atkinson about that obligation?

A. That there would be an obligation if the fact that was not disclosed or not disclosed correctly was material.

Q. And did Mr. Atkinson disagree with you, or did he argue with you on any of these points?

A. No. I don't recall him arguing with me.

Q. Let's go to the next page.

Did you talk about the vehicle or how you were suggesting to disclose these payments?

A. Yes. I believe that I had described to Peter that there were two different ways that I saw to correct the disclosure, a third potential way -- sorry. I should state what the first two were, and then I'll state the third.

Either filing an amendment to the 10-K, a so-called 10-KA which would restate the relevant item from the 10-K with the corrected disclosure included.

The other would be to contain -- to include corrective disclosure in the company's regular quarterly report.

A third alternative that I had attempted to -- to, you know, make available was including it in the supplemental proxy; but as I indicated, that had already been mailed, so it was no longer available. I believe it's also the case that the relevant vote had already occurred.

[4252]

Q. Now, when you say 10-KA, that's an amended 10-K, the A was for amended?

A. That's correct. That's what the A stands for.

Q. The quarterly report, that walk the 10-Q?

A. Correct.

Q. Did you tell Mr. Atkinson or did Mr. Saunders tell Mr. Atkinson what Cravath was suggesting be done with the disclosure vehicle? How did you want to disclose it, did you tell him that?

A. I told him that I thought the most direct and explicit correction of the mistake was filing an amendment to the report that was incorrect; namely, the 10-K.

Q. Did you tell him why you believed that?

A. Because I thought that was the more effective way to convey the information.

Q. Did Mr. Atkinson debate you on that point, or did he argue that point with you?

A. Not that I recall.

Q. Did you also inquire or did Mr. Saunders inquire about how the payments, the actual -- the money was booked financially? Did you have any conversations like that?

A. I asked the same question of Peter that I had posed in the letter dated the 23rd, where I'd suggested, I think at the end of paragraph 4 of that letter, that information that might be relevant to, you know, the whole consideration of the issue [4253] was, for example, how were these payments treated from a financial reporting point of view. How were they treated in the company's books and records.

Q. Mr. Rogers, before we leave Mr. Atkinson's notes, one question just to clarify. Did you tell him

anything regarding a complete disclosure, whether or not disclosure had to be complete?

A. I don't recall.

Q. Okay. Do you recall having any conversations with Mr. Atkinson regarding the extent of the disclosure?

MR. SCHACHTER: Your Honor, I object to the leading. The witness has already answered.

THE COURT: Sustained.

BY MR. CRAMER:

Q. Do you remember anything else about that conversation?

A. Well, Paul Saunders began to describe, and I participated in this part of the discussion, what one needs to do to we'll say cut off potential plaintiffs, potential shareholder suits. And that would be by, you know, putting this corrective disclosure on the public record, even through a 10-KA or a 10-Q with corrective disclosure included in it.

Q. I'd like to draw your attention to that page we're on right now and the second arrow from the top. Do you see that?

Do you see that?

[4254]

A. Yes.

Q. And does it say "when disclose CanWest transaction, had obligation to disclose it completely." Is that what it says?

A. Yes. That's what you were asking me about before.

Q. Correct. Is that what it says in Mr. Atkinson's notes?

A. That is what it says in his notes, yes.

Q. Sir, I'd like to move you forward in time a little bit.

As a result of -- not as a result.

We talked about conversations with Mr. Kipnis. We talked about the conversations with Mr. Atkinson. Did you have a conversation with Mr. Boultbee at any time about this issue?

A. I did. I recall that during this same time period, but again I can't tell you exactly which day, I had a telephone conversation with Jack Boultbee and Beth DeMerchant from Torys.

Q. And other than yourselves, was there another lawyer from Cravath on that telephone call?

A. Not that I can recall.

Q. Okay. Do you remember where you were at the time?

A. In my office.

Q. And tell us what you said to Mr. Boultbee and Ms. DeMerchant?

A. I repeated, in a more summary fashion, the conclusions that I had stated to Peter Atkinson in the conversation I just **[4255]** described.

Q. Why don't you go through that. You say you did it in a summary fashion. Tell us what you remember you told him.

A. I believe I said that our conclusion was that these payments needed to be disclosed.

Q. Do you remember anything else you told Mr. Boultbee and Ms. DeMerchant, either specifically or in substance?

A. Well, there was a bit of back-and-forth in that conversation, which is to say that Ms. DeMerchant asked me whether I really believed that, whether we really concluded that it was necessary.

I was surprised that she was challenging me on that, but she was.

Q. Did you make it clear --

A. And so I ended up repeating myself in the conversation.

Q. Did you make it clear in that conversation, sir, that you believed that disclosure was necessary?

A. I --

MR. NEWMAN: Objection to the form of the question.

THE COURT: Sustained.

BY MR. CRAMER:

Q. Did you tell Mr. Boultbee and Ms. DeMerchant that you believed disclosure was necessary?

A. I did.

Q. At any point during that conversation, did Mr. Boultbee [4256] argue with you --

A. No.

Q. -- about that point?

A. Not that I can recall, no.

Q. Did he push back about that point at all as far as you recall?

A. No.

Q. And, again, just so we're clear of the time frame, this is still the time frame around the conversation you just told us about Mr. Atkinson?

A. Correct.

Q. How long was that conversation you had with Mr. Boultbee?

A. I believe it was shorter. You know, say something on the order of 10, 15 minutes at the most.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	April 17, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME TWENTY
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Cross Examination of William Rogers

[4412]

Now, isn't it correct that when Mr. Atkinson asked you if Cravath could assist Hollinger on this disclosure **[4413]** issue --

A. Uh-huh.

Q. -- that you told him you would first need to, what's called, clear conflicts; is that correct?

A. Yes, if I can elaborate.

Because we had uncovered the facts that were the subject of what was going to be our

engagement, while representing another client -- Salomon Smith Barney -- we felt it was important to get them to waive or release us so that we could separately advise Hollinger on that exact bit of disclosure, keeping in mind that we were otherwise acting for Hollinger, you know, at the same time in other -- you know, various other matters.

Q. Because while you had been --

MR. SCHACHTER: Withdrawn.

BY MR. SCHACHTER:

Q. Information that you learned up until you get that --

MR. SCHACHTER: Well, withdrawn. Let me try to put this a different way.

THE WITNESS: Sure.

BY MR. SCHACHTER:

Q. Until you have gone to Salomon Smith Barney and asked for them to release you to represent Hollinger, you have loyalties to your client, Salomon Smith Barney; is that correct?

A. That is correct.

[4414]

Q. And information that you learn during the course of that representation, you may have to share with Salomon Smith Barney, as long as you are still representing them; is that correct?

A. Also, correct.

Q. And until you clear conflicts -- in other words, until Salomon Smith Barney says, "We release you, Cravath, to go represent Hollinger on this issue," any

information that you learn, you may have a duty to share with Salomon Smith Barney; is that correct?

A. That's correct.

Q. And, so, until you heard from Salomon Smith Barney that you were -- that they released you to represent Hollinger -- you couldn't say to Hollinger, "We will represent you"; is that correct?

A. Not on preparing the disclosure, that's correct.

Q. Correct.

A. Keeping in mind we were otherwise were advising Hollinger on various matters.

Q. Right.

And when Peter Atkinson asked you if Cravath would represent Hollinger in working on the disclosure of the CanWest non-compete payments, you advised him that you would need to get a conflict waiver from Salomon Smith Barney --

A. Right.

[4415]

Q. -- before you could come to represent Hollinger International; is that correct?

A. That's correct.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	April 17, 2007
Defendants.	)	1:45 o'clock p.m.

VOLUME TWENTY
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Cross-Examination of William Rogers

[4579]

Q. We're moving now into the area of the transactions we were talking about.

And in connection with it, you told us, sir, that there was a telephone conversation that you had with Ms. DeMerchant and Mr. Boultbee.

A. Yes.

Q. And as I understood your testimony -- and if I'm incorrect, please correct me -- you weren't sure who

initiated that call, whether you did or Ms. DeMerchant did.

A. Correct. I'm not sure.

[4580]

Q. And I think you also told us that as far as you were concerned, it was of relatively short duration, somewhere between 10 and 15 minutes.

A. That -- that sounds consistent with my recollection.

Q. And is it also your recollection, sir, that in connection with it, the conversation really concerned itself with the question of disclosure of the non-compete payments to individuals in connection with the CanWest transaction.

A. Correct.

Q. And that was the sum and substance of that conversation.

A. Also correct.

Q. And it was back and forth between you and Ms. DeMerchant.

A. Yes.

Q. And it was in connection with the legal ramifications, where you were trying to convince her that it was necessary to disclose these.

A. Yes. You know, at that point, I think we had satisfied ourselves that there weren't going to be supplied to us any significant facts that would change our view that these needed to be disclosed.

She wanted to hear it from me. She challenged me, I guess that's the nice -- that's maybe the best way to put it, most accurate way to put it,

and I explained that it was, you know, a serious conclusion after serious thought.

Q. And as a matter of fact, is it also fair to say that Jack [4581] Boultbee said very little, if anything, during that conversation?

A. I believe that's correct.

* * * * *

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	April 19, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME TWENTY-TWO
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

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Direct Examination of Paul Saunders

[4725]

[Q.] Generally, what was your topic that you were covering with Mr. Atkinson?

A. The topic that I was covering with Mr. Atkinson concerned the litigation risk to the company for not having made these disclosures at the time they were required to be made.

Q. Now, specifically, what did you say to Mr. Atkinson about this topic and what did he say to you?

A. I told him that -- that -- because, as Bud Rogers had explained, there was a requirement to have made these disclosures; and, because they had not been made, that the company was already at risk of a -- the risk was a litigation risk of lawsuits brought by shareholders against the company -- purchasers of securities; purchasers or sellers -- who may have purchased Hollinger International stock without knowing about the existence of this non-compete payment or payments.

And I explained that that was a significant litigation risk for the company.

Q. And what, if anything, did you say to Mr. Atkinson about how disclosures should be made?

A. We -- in the -- we were -- we were talking about the fact that these disclosures had now to be made; that there had to be a corrected disclosure made as soon as possible about the existence of these disclosures.

[4726]

And in the context -- in that context; that is, that there was going to be a corrected disclosure -- I said to Mr. Atkinson, really, by way of caution, I said that he should remember that when the disclosure

was made under the U.S. laws, there was a requirement that the disclosure be made completely; that is, if you were going to disclose this subject, you had to disclose all material aspects of this -- of this -- subject, I think I used the word "completely."

I said, "When you make a disclosure, you must make it completely."

Q. And what, if any, conversation did you have – or discussion did you have -- with Mr. Atkinson about whether the company was already exposed to liability?

A. I -- I -- told him that in my view, since, as Bud had explained, there was already a requirement that these disclosures have been made, and that they had not been made, that the company was already probably in breach of its obligations under the U.S. securities laws.

Q. And did you have any discussion about what that meant -- to be in breach -- in terms of from a financial perspective to the company?

A. Yes, we did. Mr. Atkinson asked me what -- whether this was a serious matter and how serious was it.

And I then explained to him, in general -- and maybe even more specific terms -- the kind of damage exposure that [4727] the company was facing in potential lawsuits from shareholders.

And we had a discussion about how damages would be calculated in such a lawsuit. And I was, basically, responding to a question as to how serious this matter was.

And my response was that it was quite serious. And I went through this damage calculation

so he understood how one would go about calculating the size of a damage award.

* * * * *

[4728]

[Q.] Let me direct your attention to what I'm highlighting here (indicating), where it says, "Not a defensible position."

Was anything said in your's and Mr. Rogers' conversation -- during this conversation with Mr. Atkinson regarding not -- the term "Not a defensible position"?

A. Yes. That --

Q. What was said and who said it?

A. That was said by Bud Rogers, and Bud Rogers was saying to Mr. Atkinson that the argument that -- that – this non-compete payment or payments did not have to be disclosed, was not defensible.

Q. Now, on the left-hand side, what I'm highlighting (indicating) says, "Rule 404."

Was that -- what was -- what, if anything, was said during this conversation about Rule 404?

A. I can't tell you specifically, but Bud Rogers discussed Rule 404 -- and I think maybe even another rule under the U.S. securities laws and regulations -- that required the disclosure of these payments in the published financials of Hollinger International.

So, Bud had a discussion of exactly how that rule worked and what it provided.

Q. So, that disclosure regulation would be under Bud's area of topics?

[4729]

A. Yes.

Q. Okay.

Then there's another rule that's described here, Rule 10b5?

A. Yes.

Q. What was that a reference to?

A. That was a discussion by me, and that was a reference to U.S. Securities and Exchange Commission Regulation Rule 10b5, which is a rule promulgated pursuant to Section 10B of the 1934 Securities and Exchange Act.

Q. Let me interrupt you for one second.

Is that just generally a rule discussing liability for failures to disclose?

A. It's a rule that requires that -- it's a rule that prohibits materially --

MR. SCHACHTER: Your Honor -- your Honor --

MR. SUSSMAN: I think -- I've discussed this area. I think we should be okay. But if -- let me.

THE WITNESS: I'll --

THE COURT: Wait, wait, wait.

MR. SUSSMAN: Let me back up and let me rephrase the question.

THE COURT: What is the objection?

There is an objection, but you say you have discussed it. So, what is the objection?

[4730]

MR. SCHACHTER: Just that I think that the witness is about to discuss the law, and that should come from the Court. I think that we've had sufficient testimony on this.

THE COURT: And you are correct about that.

Mr. Sussman?

MR. SUSSMAN: Your Honor, I think what I want to elicit was the nature of what was told to Mr. Atkinson, but I want to do it in as general a way as possible. So, I will ask a more leading question in this area, if that's okay.

THE COURT: Okay.

Yes, you may.

BY MR. SUSSMAN:

Q. Generally, Mr. Saunders, did you describe that there were certain securities regulations where there could be liability for a corporation if things were not disclosed properly?

A. Yes, I did.

Q. Okay.

And you explained that to Mr. Atkinson?

A. Yes, I did.

Q. Okay.

Now, I'm going to highlight on the right-hand side, it says, "Issue is whether an obligation to say anything."

Was that discussed?

A. Yes, it was.

Q. And who discussed that and what was said?

[4731]

A. I discussed that and I said to Mr. Atkinson that -- that -- although a corporation is not required to disclose everything about its business, that -- that -- there are certain specific regulations that do require specific disclosures.

So, I said that we weren't talking about a situation in which there was a general issue as to whether a particular material fact had to be disclosed; but, in the case -- as in this case, as Bud Rogers had earlier explained -- there was a specific regulation that required a disclosure. And I said that the issue -- the general issue -- that one always looks at in these cases is whether or not there is an obligation to say anything.

And I discussed that subject with him and I said that in this case there was.

Q. Now, then, there's on the left-hand side, it says, "May be in breach"?

A. Yes.

Q. Was that discussed?

A. Yes, it was.

Q. And what was discussed regarding that?

MR. SCHACHTER: Your Honor, I -- just for purposes of time, I object. This is asked and answered. We've already heard about this conversation.

MR. SUSSMAN: Well, your Honor, what I'm trying to [4732] do -- if there's a -- I'm trying to just go through these notes, in particular, to link up

the notes to the conversation, as opposed to just having the conversation.

I don't think the notes speak for themselves.

THE COURT: Objection overruled.

You may answer that question.

BY MR. SUSSMAN:

Q. About the -- sir, the question was: "May be in breach," was that discussed?

A. Yes, it was.

Q. And what was discussed about it?

A. It was discussed by me, and I said that the corporation may also -- may already -- be in breach. If there was an obligation to make a disclosure and if they hadn't made a disclosure, they were probably already in violation of the law.

Q. And underneath that it says, "In this analysis, are already exposed"?

A. Yes.

Q. Is that what you're referring to, sir?

A. Yes.

Q. Now, I'm going to highlight on the right-hand side it says, "When disclosed, CanWest transaction had obligation to disclose it completely"?

A. Yes.

[4733] Q. Is that a reference to what you had mentioned earlier?

A. Yes, it is.

Q. And, then, sir, under "Loss Causation," "Loss Causation would not have bought stock if had known." What's that a reference to?

A. That's a reference to my discussion with Mr. Atkinson about how one goes about determining damages in a 10b5 case. And there's a requirement that loss causation be shown. And the question that is asked is whether or not the shareholder would have purchased stock or sold stock if the truth had been known.

Q. And, then, underneath, there's a reference that says, "If disclosed today and stock price dropped, would be measure of loss."

What's that a reference to?

A. Yes. That's a further reference to my discussion with Mr. Atkinson about the way in which one calculates damages in a shareholders' lawsuit brought under 10 -- Section 10-B.

Q. I'm going to ask you in a second to turn to -- I'm going to show you the second page.

This area (indicating), sir, discussing, "How do we minimize exposure?"

And, then, there's a discussion of "10-Q filing coming up. Maybe do disclosure in 10-Q. Gets disclosure out there," is that a reference to any portion of your [4734] conversation with Mr. Atkinson?

A. It's a reference to the portion -- a portion -- that was conducted primarily by Bud Rogers.

Q. And is that what you were discussing earlier, I think, in your testimony about how Mr. Rogers then had a conversation with Mr. Atkinson about, "If it's

going to be disclosed, what's the best vehicle for disclosing"?

A. Yes. They were discussing what upcoming filings there were, that could contain this disclosure.

Q. And is it fair to say that that's more Mr. Rogers' area of expertise than your area?

A. Yes, it was.

Q. Okay.

Now, sir, at some point during your conversation with Mr. Atkinson, did you discuss the issue of whether payments received by executives could be considered material even if the payments were relatively small, compared to the wealth of the executives who received them?

A. Yes.

Q. And what did you tell Mr. Atkinson, if anything, about whether this was the proper way to analyze the situation?

A. I told him that that was not the proper way to analyze the situation. I told him that the proper way to analyze the situation was what would have been material -- what would have been material -- to a reasonable purchaser or seller of [4735] securities; that it didn't matter whether the payments were large or small in comparison to the income or the wealth of the person receiving them. I said, that was not the right way to look at it. I said, "You look at it from the point of view of a reasonable purchaser or seller of securities."

Q. So, it's whether these payments would have been important to that purchaser or seller of securities?

A. Exactly.

Q. Now, let me -- I forgot to show you one other --

(Brief pause.)

BY MR. SUSSMAN:

Q. Let me ask you: During your conversation with Mr. Atkinson, did Mr. Atkinson ask you and Mr. Rogers any questions?

A. Well, we've already discussed some of the questions that he asked. There were no really specific questions that I recall, other than the ones that we've already discussed.

I mean, he asked, you know, whether this is a serious matter for the corporation.

There was a discussion about how quickly this could be disclosed.

There was this discussion about the question about how one measures materiality -- from what point of view – and so forth.

I don't recall any other questions that he asked.

[4736]

Q. Did Mr. Atkinson disagree or challenge anything that you or Mr. Rogers told him?

A. No.

Q. Now, based on your discussion with Mr. Atkinson and the questions that he asked you, did he appear to understand what you were telling him?

MR. SCHACHTER: Your Honor --

BY MR. SUSSMAN:

Q. What you and Mr. Rogers were telling him?

A. Yes, he did.

MR. SCHACHTER: Objection.

THE COURT: Wait.

MR. SUSSMAN: Your Honor, I believe there is a sufficient foundation from this witness to be able to testify. And I'm happy to lay more as to whether he believed Mr. Atkinson understood what he was saying.

MR. SCHACHTER: This is the jury's decision.

THE COURT: Objection sustained.

You can ask other questions around that.

MR. SUSSMAN: Okay.

Thank you, your Honor.

BY MR. SUSSMAN:

Q. Let me ask it this way, sir: At any point in time did Mr. Atkinson stop you and ask you to explain certain terminology?

[4737] A. No.

Q. At any point in time did Mr. Atkinson ask you to clarify certain points that you were making?

A. No.

I mean, the only -- the only -- issue of that type that was discussed was the question of how one determines materiality.

But except for that, he didn't ask for any other clarification.

Q. Did Mr. Atkinson ask you -- when the reference to Rule 404 was brought up, do you recall him asking

Mr. Rogers, "What is Rule 404?" or any questions along that?

A. No, not at all.

Q. When you brought up 10b5, were there any questions about what 10b5 was?

A. No.

Q. When you brought up the issue of shareholder litigation, were there any questions about what that meant?

A. No.

Q. When you discussed measuring loss in a shareholder litigation lawsuit, did Mr. Atkinson ask you specific questions about that?

A. No, he didn't.

Q. There were discussions we saw about 10-Qs and 10-Ks.

Did Mr. Atkinson ask you any questions or Mr. Rogers [4738] any questions about those?

A. Only about how quickly they could be filed.

* * * * *

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	April 23, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME TWENTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of Marilyn Stitt

[4943]

Q. Coming away from the meeting -- well, before we go away from the meeting, during the meeting was

there some – was there anything -- different or especially significant about your discussion about the U.S. Community non-competes, as opposed to any of the other topics that were covered during the session?

A. No. We -- we -- wanted to make sure that the Audit Committee were aware of them. And we wanted -- although it's not necessarily required under our auditing standards, we wanted -- to ensure -- because we thought it was the appropriate thing to do, to make sure -- that they had previously been approved and that -- and, so, we were there looking for confirmation that there was perhaps some lack of clarity in the original Minutes; and, we were just looking for [4944] clarification that, in fact, they had been previously approved.

Q. And coming out of the meeting, what was your understanding of the status of that issue concerning the U.S. Community non-competes?

A. Although they didn't say anything explicit, they didn't -- they didn't -- raise any concerns; they didn't object; they didn't ask any questions in the general session, in the private session.

I -- I -- took the -- you know, there was a pregnant pause as we were sort of waiting for a reaction, and there was none. And we proceeded with the rest of it. And I took away from that meeting that they, basically, confirmed to us that they had previously been approved.

Q. Given your knowledge and your participation on the audit, why were you satisfied coming away from the meeting that that issue was resolved to your satisfaction?

MR. SWARTZ: Objection.

THE COURT: What is your objection?

MR. SWARTZ: It's relevance.

MS. RUDER: Again, your Honor --

MR. SWARTZ: Giving an understanding based on --

MS. RUDER: -- it informs what she does next and actions that she takes next.

THE COURT: Overruled.

[4945] You may answer.

BY THE WITNESS:

A. Sorry, can you just repeat the question?

BY MS. RUDER:

Q. Yes.

The question was: Why was it, coming away from the meeting -- with the interaction that you've described, why were you satisfied coming away from that meeting with the status of the issue?

A. Because nobody objected at the meeting to say these hadn't previously been approved. I mean, I took their silence as meaning that they had -- they had -- considered them before and they had been approved.

Q. Was that consistent with your understanding at the time?

A. Yeah. I mean, I -- I -- certainly didn't go into the meeting thinking that these have never been tabled before the Audit Committee. I mean, we -- we -- just asked for them to clarify or to confirm that they had previously been approved.

And similarly with the Osprey, you know, although we understood that they hadn't formally been tabled with the Audit Committee, it was our understanding that the Audit Committee had verbally agreed to it. And, again, we're there just looking for confirmation that, in fact, you know, they had verbally approved it and they would be ratifying it on that day.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
Vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	April 23, 2007
Defendants.	)	1:45 o'clock p.m.

VOLUME TWENTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

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Cross-Examination of Marilyn Stitt

[5126]

Q. After Mr. Ryan made his statement about looking to confirm the Audit Committee's approval of the 15 million in non-compete payments made in connection with the U.S. community newspaper sales, did Governor Thompson say -- respond by words anything to the effect that "I have never heard of $15 million in non-compete payments to individuals before"?

A. Governor Thompson didn't say anything after we asked the question about asking them to confirm that they had been previously approved.

Q. Did Mr. Burt say anything in response to Mr. Ryan's statements about looking to confirm approval of the $15 million in payments in connection with the U.S. community newspaper transactions?

A. Whomever was on the phone did not indicate any comment either.

Q. To be totally clear, there were no objections whatsoever stated by either Governor Thompson or Ambassador Burt in [5127] response to Mr. Ryan's comment that he's looking to confirm approval of $15 million in -- $15 million paid in 2000 in connection with U.S. community newspaper transactions.

A. That is correct.

Q. Now, you were sitting in the same room as Governor Thompson, right?

A. Correct.

Q. You testified he didn't say anything in response. Did he give any non-verbal cues that he was shocked to hear about this disclosure?

MS. RUDER: Objection to form.

THE COURT: Overruled.

BY THE WITNESS:

A. I remember making eye contact with him. He was sitting at the head of the table. There was --

BY MR. SWARTZ:

Q. He was paying attention?

A. He was paying attention. There was a pregnant pause, and there was no look. He didn't raise any objections, didn't ask any questions of Mr. Kipnis who was sitting beside him, nothing.

Q. And based on your eye contact and that pregnant pause and the statement that Mr. Ryan had made, it was clear from your perspective that Governor Thompson was reconfirming his approval of these payments.

[5128]

A. Yes. I left on the basis that they had been previously approved, and they had confirmed it to us at that meeting.

Q. And similarly from the clarity of Mr. Ryan's statements and from the pause that you've described, it was also your understanding that Mr. Burt was confirming his approval of the $15 million in non-compete payments.

A. That is correct.

* * * * *

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	April 24, 2007
Defendants.	)	1:45 o'clock p.m.

VOLUME TWENTY-FIVE
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY
* * * * * * * * * * * * * * * * * * * *

Direct Examination of Richard Burt

[5385]

Q. What was the Executive Committee?

A. The Executive Committee was a subcommittee of the board which could act in lieu of the board, in the place of the board if a decision needed to be taken in between board meetings.

So if, for one reason or another, the board couldn't be convened to address a decision, the Executive Committee could act for the board.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	April 25, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME TWENTY-SIX
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of Richard Burt

[5545]

Q. Now, let's go back to that December 4th where you adopted the resolutions. Are you with me?

A. Yes.

Q. Were these unanimous consents we just looked at -- Executive 1-C, Executive 1-D and Executive 1-E -- are those the three written consents that the Board of Directors adopted on December 4th, 2000?

A. I believe they are.

Q. Sir, tell us what, if anything, did Conrad Black tell you about in the CNHI deal that any of the officers were going to **[5546]** be receiving non-competition money from that deal?

A. You mean CNHI II?

Q. CNHI II.

Did he tell you anything about individuals receiving non-competition money in CNHI II?

A. No.

Q. What, if anything, did Conrad Black tell you about individuals receiving money from Non-Competition Agreements on the Paxton deal?

A. Nothing.

Q. What, if anything, on December 4th, 2000, did Conrad Black tell you about individuals receiving non-competition money on the Forum deal?

A. Nothing.

Q. Now, did you approve these resolutions that we're looking at right here?

A. You mean these actual -- the ones that are just the (a), (b) and (c)?

Q. Just the (a), (b) and (c).

A. Yes.

Q. And did Conrad Black mention anything to you or other members of the Board of Directors about Inc. receiving non-competition money on CNHI II or Paxton or Forum when you met on December 4th, 2000?

A. No.

[5547]

Q. Would it have been relevant in deciding whether or not to approve the Executive Committee's consents to know that individuals had received money on those three deals, and that Inc. had received money on those three deals?

A. Yes.

Q. Why?

A. Well, again, one of the responsibilities of the Audit Committee was if individuals were going to receive money -- individuals within the company or Inc. or Ravelston -- that is by definition a related-party transaction, and those transactions should be brought before the Audit Committee; and, they should be assessed in terms of their fairness to the company.

Q. Was the Audit Committee -- were any of these transactions brought to the Audit Committee, either CNHI II, Paxton or Forum?

A. No.

* * * * *

[5574]

Q. When you made your decision, how to go in the Audit Committee meeting, were you aware of the non-competition monies paid to individuals and Inc. in the CNHI II, Forum or Paxton transactions?

A. No.

Q. How about the monies we discussed earlier that went to Inc. in CNHI I and Trucker and Horizon? Were you aware of those?

A. No.

Q. Would those payments have been relevant to you at this meeting in making your decision?

A. Yes.

Q. How so?

A. Well, there would have been a pattern of paying – of related-party transactions that had not been explained to the Audit Committee.

Q. Were you aware about any of the payments in APC when you made your decision on May 14th, 2001?

A. No.

* * * * *

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
Vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	April 27, 2007
Defendants,	)	8:45 o'clock a.m.

VOLUME TWENTY-EIGHT

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of Marie-Josee Kravis

[6029]

Q. Now, let's talk a little bit more about your own roles on the Board and on the Audit committee, Ms. Kravis.

Are you familiar with a concept called, "fiduciary duty"?

A. I am.

Q. How are you familiar with that concept?

A. Well, I'm familiar with that concept in terms of my experience on Boards of Directors.

Q. Based on your experience as a Board member for various companies including Hollinger International -- what is your understanding of a Board member's fiduciary obligation?

A. Well, the fiduciary obligation calls for putting the interests of the shareholder first, and that's of all shareholders.

Q. As a Board member for Hollinger International, did you owe fiduciary duties?

A. Yes.

Q. To whom?

A. To all the shareholders of Hollinger International.

Q. As an Audit committee member at Hollinger International, did you have fiduciary duties? [6030]

A. I did.

Q. And to whom did you owe those duties?

A. To the shareholders of Hollinger International.

Q. Now, we talked before about the Canadian company Hollinger, Inc. At the time that you were on the Board of Hollinger, Inc., did you have fiduciary duties to that company's shareholders?

A. I did.

Q. Once you became a Board member of Hollinger International, how, if at all, did the scope of your responsibilities to Inc. change?

A. Well, I continued to have fiduciary duties towards the shareholders of Hollinger, Inc., because they were shareholders of Hollinger International.

But, in addition to that, I had fiduciary responsibility to all the other shareholders of Hollinger International.

Q. Did you understand the Audit Committee or the Board of Directors to be required to put Hollinger, Inc.'s interests over those of other shareholders?

A. No.

Q. Were you able to put Conrad Black's interests over those of other shareholders?

A. No.

Q. Now, this management -- some of the management that we've [6031] discussed: Mr. Black, Mr. Radler, Mr. Boultbee, Mr. Atkinson and Mr. Kipnis -- did you understand them to have duties to Hollinger International and its shareholders?

A. Yes, I did.

Q. What kinds of duties?

A. Well, they had the same fiduciary duties, and duties of loyalty, to those shareholders, as any other director.

Q. Did your knowledge that this management team had fiduciary duties, did that impact your own service as a Board member and an Audit committee member?

A. Well, to the extent that I felt that all of our duties and interests were aligned, yes.

Q. How so?

A. Well, because we were all part of the same Board of Directors and the senior officers were part of the same company, and we have the same duties.

* * * * *

[6073]

Q. At the time of the Board and Audit Committee meetings of September 11, 2000, when you were discussing the CanWest transaction, what, if anything, were you told then about these pending deals with Forum, Paxton and CNHI II?

A. Nothing, that I recall.

Q. Did anyone advise you that there would be related-party elements of these deals for the consideration of the Audit Committee?

A. No.

* * * * *

[6075]

Q. Let me ask it a different way.

Were the members of the Audit Committee independent directors?

A. They were not.

Q. I'm sorry, I'm focused on the Audit Committee.

A. Oh, I'm sorry.

The Audit Committee. Yes. Yes, I'm sorry.

Q. Were the members of the Executive Committee independent directors?

A. No.

Q. And does that make any difference in terms of who can review related-party transactions?

A. Yes, it does.

Related-party transactions are to be reviewed by independent directors.

Q. All right.

And with that context and that background, in your understanding, could the Executive Committee take an action on related-party matters?

A. No.

* * * * *

[6079]

Q. What, if anything, do you remember being said by Mr. Black at the December, 2000, Board meeting concerning these specific Executive Committee Consents?

MR. GREENSPAN: Well, shouldn't -- I object to the question. My respectful submission, she should be asking whether or not she remembers any of this being discussed at all.

MS. RUDER: I believe that is my question.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. I simply recall that these transactions were presented as concurring with the general strategy of the company to divest itself of the small community papers; and, the general strategy had also been that we tried to seek prices that were ten times EBITDA.

BY MS. RUDER:

Q. What, if anything, was described concerning non-compete payments to Hollinger, Inc., being part of these transactions?

A. Nothing.

Q. What, if anything, was explained concerning non-compete payments to individuals being part of any of these transactions?

[6080]

A. Nothing.

Q. In terms of the actual Executive Committee Consents that are referenced here, were those provided to you in the December 4, 2000, meeting?

A. They were not.

Q. Had -- up until preparation for the trial in this case, had -- you ever seen them?

A. No.

Q. Had the Board ever asked you to review them and approve the actual Consents, themselves?

A. No.

* * * * *

[6085]

Q. As an Audit Committee member, Ms. Kravis, did you receive any memos, phone calls, documentation about CNHI II, Paxton and Forum before those deals happened?

A. No.

Q. Did anyone ask if you were available, as an Audit Committee member, to review CNHI II, Paxton or Forum as of September 15th, 18th or 19th, 2000?

A. Not that I know of.

Q. Did anyone ask if you were available to take a phone call on those deals?

A. Not that I know of.

Q. Did anyone ask if you were available to meet?

A. Not that I know of.

Q. Was the time limited to the September 11, 2000, meeting such that those transactions could not be discussed?

A. I don't think so.

Q. At the time -- as of September 15th to 19th, 2000 -- Ms. Kravis, did you know who from Hollinger was the attorney that was working on these three transactions?

[6086]

A. I did not.

Q. Were you generally in communication with Mr. Kipnis during this time frame?

A. Yes.

Q. What, if anything, did Mr. Kipnis tell you about the need for the Audit Committee to review related-party elements of these deals?

A. Nothing.

Q. When we looked at the Minutes of the December 4, 2000, meeting, you identified for us Mr. Black, Mr. Radler, Mr. Boultbee and Mr. Atkinson were all present; is that correct?

A. That's correct.

Q. What, if anything, did Mr. Black say at the December 4, 2000, meeting about money that he had received in the CNHI II deal?

A. Nothing.

Q. What, if anything, did Mr. Boultbee say about money he had received in that transaction?

A. Nothing.

Q. What, if anything, did Mr. Atkinson say about the money that he had received?

A. Nothing.

Q. If, in fact, executives had received non-compete money in those deals, do you consider that to be a related-party [6087] transaction?

A. I do.

Q. Did you approve any such money to the executives, Ms. Kravis?

A. I did not.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	May 1, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTY
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Recross-Examination of Marie-Josee Kravis

[6576]

Q. Well, the ones that you saw -- the two 10-Ks and the proxy -- that's public filings where the shareholders learned what you supposedly did at the audit -- what the Audit Committee supposedly did; isn't that right?

A. Sir, as I testified yesterday, these disclosures were not complete. They did not include all -- they did not include, for example, the monies transferred to Hollinger, Inc.

Q. I understand that.

But with respect to what you did in approving certain things -- you're talking about what you may not have approved. I'm talking about the things that you did approve.

They would find that by the public filings, which would state whether you approved it or didn't; isn't that right?

A. Sir, we did not approve those non-competes.

Q. Notwithstanding the fact that you told, in filing after filing after filing that you did; isn't that right?

A. We did not approve those non-competes.

* * * * *

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 1, 2007
Defendants.	)	1:45 o'clock p.m.

VOLUME THIRTY

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of James Thompson

[6671]

Q. Are you familiar with a concept called fiduciary duty?

A. Yes.

Q. How are you familiar with that concept, sir?

A. Through 48 years of the practice of law and Board service.

Q. Sir, let me ask you, if you can, to direct your attention to your experience as Board -- when you answer these questions about fiduciary duty --

A. Yes.

Q. -- to your experience on Boards.

A. Okay.

Q. And I'm going to ask you these questions with respect to your understanding as a Board member about fiduciary duty.

A. Okay.

Q. Based on your experience at Hollinger as a Board member, did you have a fiduciary duty to -- did you have a fiduciary duty?

A. Yes, sir.

Q. And to whom?

A. To the company and to its shareholders.

Q. And what did you understand that duty to be?

A. The duty of loyalty, the duty of care, the duty of good faith.

Q. What did you under -- what, if anything, did you **[6672]** understand that that required you to do with respect to the shareholders at Hollinger International?

A. To represent to the best of my ability, under the business judgment rule, the interests of the shareholders.

Q. And did you make distinctions between and amongst the shareholders?

A. No.

Q. Did you have an understanding as to whether the management team at Hollinger International -- the executives, the officers -- had fiduciary duties to Hollinger International?

A. Absolutely.

Q. What was your understanding?

A. That they had the same duties that I, as a member of the Board, did and that Delaware law -- where the company was incorporated -- commanded.

Q. And what, if any, influence did those duties have, that you understood the officers had, what influence, if any, did that have on the performance of your duties as a Board member and an Audit Committee member?

A. Well, I presume that under a duty of loyalty to the company and fiduciary duty, that the officers and employees of the company would have dealt fairly and honestly with the Board or any of its committees.

* * * * *

[6747]

Q. And do you recall looking at that particular line in the minutes --

A. Yes.

Q. -- at all?

And what, if anything, do you recall believing that that line was a reference to?

A. I didn't understand it because bonuses for senior management would have come from Ravelston, not the company. The company didn't pay bonuses to Ravelston employees.

* * * * *

[6754]

Q. Did you review executive -- the executive consents listed below?

A. No.

Q. Why not?

A. It wasn't my practice. The Executive Committee had the power under our bylaws to enter into transactions, as long as they were later ratified by the board at the subsequent meeting.

There was nothing in the reference in the resolutions that would have led me to believe that I needed to go read the consents in the minutes.

Q. At the time Mr. Black presented these consents for approval, what, if anything, did he tell you about related-party aspects to either of these three transactions?

A. Nothing.

Q. What, if anything, did Mr. Black tell you about why the approvals for these transactions were done in the form of Executive Committee consents rather than full board presentations?

A. Nothing.

Q. As an Audit Committee member, did you receive any memos or other documentation of these transactions before they happened?

A. No.

[6755]

Q. And did Mr. Black or anyone else for that matter seek your input about related-party aspects to these transactions?

A. No.

Q. Did any -- did anyone tell you there were related-party aspects to these transactions?

A. No.

Q. Sir, when was the first time that you reviewed these Executive Committee consents?

A. I think during the course of our investigation of the company by the Special Committee.

Q. Now, as of the board of directors meeting on December 4th, 2000, were you aware of Inc. receiving $2 million in non-compete payments in American Trucker?

A. No.

Q. As of that meeting date, December 4th, 2000, were you aware of Inc. receiving a $12 million non-compete payment in the first CNHI deal?

A. No.

Q. Were you aware of Inc. receiving a $1.2 million non-compete payment in Horizon?

A. No.

Q. Were you aware of Inc. receiving a $750,000 non-compete payment in the second CNHI deal?

A. No.

Q. Were you aware of Inc. receiving another total 600,000 [6756] in non-compete payments in the Forum and Paxton transactions?

A. No.

Q. Were you aware of Mr. Black, Mr. Boultbee, Mr. Radler or Mr. Atkinson receiving a total of $9.5 million in individual non-compete payments in the CNHI deal?

A. No.

Q. Based on your understanding as chairman of the Audit Committee, was the Executive Committee approval of these transactions, of related-party transactions, sufficient?

A. No.

Q. Why not?

A. Because two of the members of the Executive Committee were inside directors and only one, Mr. Perle, could in any sense be characterized as an independent director, and our bylaws required approval and the New York Stock Exchange required approval of related-party transactions by independent members.

* * * * *

[6761]

Q. Did anyone ask your approval for payments to these Ravelston executives?

A. No.

Q. Would this be -- is -- excuse me, Governor.

Would these payments be something that would require Audit Committee approval?

A. Payments by Hollinger International?

Q. Yes, I'm sorry, by Hollinger International to the executives.

A. Absolutely.

Q. Why is that, sir?

A. Because they would be related-party transactions.

Q. What, if anything, did Mr. Kipnis advise you, as the Audit Committee chairman, about such payments being made?

A. He did not advise me.

Q. What, if anything, did Mr. Kipnis advise you regarding his drafting of non-compete agreements in the APC payments?

A. He never told me he drafted those agreements.

Q. As of April 2001, what, if anything, were you told about Mr. -- about Mr. Black, Mr. Radler, Mr. Atkinson and Mr. Boultbee receiving additional non-compete money from proceeds of the Forum and Paxton transaction?

[6762]

A. Nothing.

Q. Did anyone ask you to approve such payments?

A. No.

* * * * *

[6783]

Q. When this was happening in May 2001, at that time, did you know any details about the total 9.5 million in non-compete payments that had been made to Mr. Black, Radler, Boultbee and Atkinson in the CNHI II transaction?

A. No.

Q. Did you know anything about individual non-compete payments that had been made to Mr. Black, Mr. Radler, Mr. Boultbee and Mr. Atkinson in the Forum transaction?

A. No.

Q. Did you know anything about non-compete payments that had been made to Mr. Black, Mr. Radler, Mr. Boultbee or [6784] Mr. Atkinson in the Paxton transaction?

A. No.

Q. Did you know anything about the $5.5 million that executives had received, Mr. Black, Mr. Radler, Mr. Boultbee and Mr. Atkinson, after signing non-compete agreements with APC?

A. No.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 2, 2007
Defendants.	)	1:45 o'clock p.m.

VOLUME THIRTY-ONE

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* *

Cross-Examination of James Thompson

[7117]

Q. So -- and perhaps I should have been more fulsome in the hypothetical.

If Mr. Radler came to you and said at the beginning of 2001 there are $5.5 million of the 37.8 million that were unpaid -- are you with me?

A. Yeah.

Q. -- that 5.5 million that the Audit Committee already approved is unpaid, and we'd like to pay it to the Ravelston [7118] individuals in the form of Non-

Competition Agreements because that is tax advantageous to the recipients.

Are you with me?

A. I'm with you.

Q. Would that have raised a question in your mind?

A. Yes.

Q. Why?

A. Because it would have been out of the ordinary course of how management fees were paid.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 3, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTY-TWO
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

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Redirect Examination of James Thompson

[7264]

BY MR. SUSSMAN:

Q. Governor Thompson, did the Audit Committee ever approve non-compete payments in the U.S. community transactions to Conrad Black?

A. No.

Q. Did the Audit Committee ever approve non-compete payments in the U.S. community transactions to Jack Boultbee?

A. No.

Q. Did the Audit Committee ever approve individual non-compete payments in the U.S. community transactions to Peter Atkinson?

A. No.

Q. When, if ever, did you advise Mr. Black, Mr. Boultbee, Mr. Atkinson or Mr. Kipnis that they had your approval to take 15 -- over $15 million to a company controlled by Conrad Black from the sale of U.S. community newspapers?

A. Never.

Q. When, if ever, did you tell these four defendants that they had your permission to take $15.6 million from the sale of U.S. community newspapers to pay to senior executives at Hollinger International?

MR. SAFER: Objection, your Honor.

[7265]

BY THE WITNESS:

A. Never.

* * * * *

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 7, 2007
Defendants,	)	9:00 o'clock a.m.

VOLUME THIRTY-EIGHT

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of David Radler

[7476]

BY MR. SUSSMAN:

Q. Sir, did you decide to go into business and start up this newspaper with Mr. Black?

A. It was a purchase, yes.

Q. Did you decide to purchase this newspaper with Mr. Black?

A. Ultimately, yes.

Q. And why did you decide to go into business and purchase this newspaper with Mr. Black?

MR. GENSON: Objection. We're talking about 1969.

THE COURT: Overruled.

You may answer that.

BY THE WITNESS:

A. Well, I was impressed with Mr. Black's knowledge and his ability; and, I thought he would, you know, be a great partner to have.

BY MR. SUSSMAN:

Q. Now, you mentioned that the Sherbrooke Record was an [7477] English-speaking newspaper in a French area; is that right?

A. That's correct.

Q. Just by way of a little background, are there French-speaking areas of Canada and English-speaking areas of Canada?

A. Generally, that's the case, yes.

Q. Okay.

I didn't know these things. So, I'm trying to make it -- take it from there.

Now, sir, where was -- was this in a particular province, the Sherbrooke Record?

A. The Record was in -- it was in -- Quebec.

Q. Okay.

Now, did Mr. White go in on this deal with the two of you, as well?

A. Yes, he did.

Q. And how much did the three of you pay for the Sherbrooke Record in 1969?

A. We paid a gross of $50,000.

Q. And how much -- when you say, "a gross of $50,000," what do you mean?

A. We -- we -- we bought the assets for $50,000, assumed $30,000 of liabilities, which gave us a net of $20,000 that we actually had to put up.

Q. Okay.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
Vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 8, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME THIRTY-FOUR

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of David Radler

[7784]

Q. Now, were you involved in any -- negotiating any other newspaper transactions in the United States around that period of time?

A. Yes, I was.

Q. Were there any discussions about how non-compete agreements would be handled in those upcoming U.S. transactions?

A. Yes, there were.

Q. Let me back up for one second. What were the upcoming U.S. transactions that you were working on?

A. They're known as, you know, having been -- they were actually, once they were -- once the deals were made, they were known as CNHI II, Paxton and Forum.

Q. Now, with respect to these discussions about non-compete agreements, who did you speak with about this topic?

A. I spoke to Mr. Black.

Q. Did you speak to Mr. Black in person or over the phone?

A. Over the phone.

Q. Do you recall the exact date of this conversation?

A. No, I don't.

Q. As best you can recall, when was the conversation?

[7785]

A. It would have -- around August 1st, perhaps a little later.

Q. Was there one conversation or more than one conversation with Mr. Black on that topic?

A. There was more than one conversation.

Q. And were both conversations around the same time, or were they at different -- were they at different times?

A. No, they were at different times -- around -- excuse me. Around the same time.

Q. Can you separate these conversations in your mind?

A. It's -- no, I can't.

Q. Who else was on the phone with you and Mr. Black during these conversations?

A. It was just Mr. Black and myself.

Q. What did Mr. Black say to you, and what did you say to him?

A. I -- I was -- I pointed out to him that we were about to do the three transactions that I just mentioned and that --

MR. GENSON: Your Honor, I'm sorry, I should have objected. Do we know where Mr. Black was -- where they were calling from as far as he knows?

THE COURT: Mr. Sussman?

BY MR. SUSSMAN:

Q. Mr. Radler, do you know where Mr. Black was calling from?

A. No, and I would have to look at my records to determine [7786] that.

Q. You were starting to say what did Mr. Black say to you, and what did you say to Mr. Black during these conversations?

A. We talked about the -- the CanWest non-competes and the opportunity to extend the CanWest non-competes to the sales in the United States, and I pointed -- I may -- I said that, and he was supportive of the idea.

Q. What idea, sir?

A. The idea of extending the non-competition payments into the American -- into the American deals, the upcoming American deals.

Q. Specifically, what did you say and what did Mr. Black say about extending the non-competes in the American deals?

A. Specifically, I pointed out to Mr. Black that I believed that we were covered, that we were covered in these non-competes by the corporate non-competes, and that we should or we had an opportunity to take personal non-competes in -- in -- in this process.

Q. Had you made -- were you -- at this point, was Hollinger International going to be making or losing money on the sales of these newspapers?

A. Hollinger International was making a lot of money on the sales of these newspapers.

Q. Did you discuss this at all in your conversation with Mr. Black --

[7787]

A. We certainly did.

MR. GENSON: Objection. Leading, if your Honor please.

THE COURT: Overruled.

You may answer that question.

BY THE WITNESS:

A. Yes. We talked about the money that we were going to make. We probably -- I don't want to say probably, but I would have likely have had a number on exactly how much we were going to make on each transaction.

BY MR. SUSSMAN:

Q. What, if anything, did Mr. Black say to you or did you say to Mr. Black on this topic?

A. Well, the feeling was that because of the amount of money that we were making that --

MR. GENSON: Objection to what the feeling is, your Honor.

BY MR. SUSSMAN:

Q. I'm going to interrupt you, sir --

THE COURT: Sustained.

BY MR. SUSSMAN:

Q. -- and just ask you specifically what you said -- what you recall saying to Mr. Black and what you recall hearing him say in response?

A. He suggested that we insert ourselves in the non-compete [7788] process, and I agreed.

Q. When Mr. Black said we insert ourselves, what did you understand him to be referring to?

A. To take non-compete payments from the -- from the next three transactions, at least the three that we knew about.

Q. And who did you understand would be inserted in the next three transactions?

A. My understanding was that the same people who had been inserted into the -- I don't want to use that word.

MR. NEWMAN: Objection to the word inserted, your Honor.

BY THE WITNESS:

A. I take it. That the same four people who had participated in the CanWest non-compete would also be included in the American non-competes.

BY MR. SUSSMAN:

Q. And how did you get that understanding as to those specific people?

A. We named them.

Q. Were they named in this conversation, sir?

A. Yes.

Q. Okay. And who were the names that were mentioned?

MR. GENSON: Your Honor, again, I don't know who named what.

MR. SUSSMAN: Well, I'm getting there, your Honor.

[7789]

THE COURT: Okay.

BY MR. SUSSMAN:

Q. Who, as between you and Mr. Black, named individuals?

A. I may have named them, and he may have agreed; or he may have named them, and I may have agreed, so --

Q. Okay. And who were the individuals that were named in this conversation?

A. Mr. Boultbee and Mr. Atkinson.

Q. And any other individuals?

A. Well, ourselves.

Q. And at the time of this conversation, did you have an understanding as to who had signed non-compete agreements in the CanWest transaction?

A. At the time of this conversation, I was aware who signed non-compete agreements.

Q. What was your understanding as to who had signed non-compete agreements?

A. At that time?

Q. Yes.

A. Mr. Atkinson, Mr. Boultbee, myself and Mr. Black.

Q. What, if anything, was said in your conversation with Mr. Black about checking as to whether the buyers wanted non-compete agreements from yourself, Mr. Black, Mr. Atkinson and Mr. Boultbee?

A. The -- the conversation was that we would insert ourselves [7790] into the process at that time.

* * * * *

[7831]

Q. Were the non-compete payments to Hollinger, Inc. ever presented to the Audit Committee or the board for Hollinger International?

A. No, they weren't.

Q. Why not? Why didn't you present them, sir?

A. Because it would be impossible to present a non-compete for a company that -- or to a company that -- where the -- where the buyer hadn't requested that the company be included in -- in the non-compete process.

Q. Well, when you say it's impossible to present it, why didn't you just tell the board or the Audit Committee what you just said here, sir?

A. Well, I could have, but I don't think they would have agreed.

* * * * *

[7833]

Q. Let me ask you this: Did you ever present -- we've talked about CNHI II. Did you ever present the payments to individuals from CNHI II to the Audit Committee or the board for Hollinger International?

A. No, I didn't.

Q. Why not?

A. Well, once again, CNHI II had not asked for the non-competes and -- and it was -- it would have been very difficult to go in to the Audit Committee and tell them that even though CNHI didn't ask for the non-competes that here are some non-competes.

Q. Why would -- why are you testifying that you believe it would have been very difficult?

A. There were -- I -- there were some -- the people on the board would have been very questioning about spending Hollinger's -- sending Hollinger money to Inc. for -- for -- without the demand coming from the -- from the purchaser.

Q. Now, let me direct your attention to the spring of 2001. Well, let me back up for one second.

With respect to the Paxton and Forum transactions, were individual non-compete agreements signed by any of the International executives?

A. No.

Q. Now I want to direct your attention to the spring of 2001. Did you receive a phone call at that point in time concerning [7834] individual non-compete payments in the Paxton and Forum transactions?

A. Yes.

Q. Who did you receive a phone call from?

A. I believe it was Mr. Black.

MR. GENSON: Objection to who he believes. He either knows or doesn't.

THE COURT: Sustained.

BY MR. SUSSMAN:

Q. Who do you recall receiving the phone call from, sir?

A. It was -- it was -- I'll change it then. It was – I believe it was -- I can't say that.

Q. What do you recall?

A. It was Mr. Black.

MR. GENSON: Objection to the answer. It was; I'll change it; I believe. I move it be stricken.

THE COURT: That's a weight issue. You're free to cross on that.

BY MR. SUSSMAN:

Q. Sir, who was on the phone call with you and Mr. Black at this time?

A. No one, just us.

Q. What did you say to Mr. Black, and what did Mr. Black say to you?

A. Mr. Black asked me whether there were non-competes at [7835] Forum and Paxton.

A. I told him I'd get back to him.

Q. And what did you do after taking that phone call?

A. I phoned -- I went to see Mark Kipnis, and I phoned – I phoned to Roland McBride who controlled the funds at – at American Publishing, and I asked him if there was non-compete money at -- in his -- in his funds.

Q. At the time you received the phone call from Mr. Black, what, if anything, did you believe about whether money had been set aside in the Paxton and Forum transactions for non-compete payments?

MR. GENSON: Objection, foundation.

THE COURT: Overruled.

You may answer if you can.

BY THE WITNESS:

A. I thought the money was there. I thought the money had been set aside.

BY MR. SUSSMAN:

Q. Why did you think the money had been set aside?

A. Because I had told Mark Kipnis prior to the closing of those deals about money to set aside.

Q. Why did you tell Mr. Kipnis to set aside money for individual non-compete payments?

A. Because I had told Mark Kipnis about the non-compete – [7836] the individual non-competes.

Mr. Kipnis couldn't set aside the money, but he would have made the arrangements to see the money set aside.

Q. At the time that you received these -- this phone call from Mr. Black and then made the phone call to Mr. McBride, how much did you believe had been set aside for individual non-compete payments?

A. About 3 percent of the proceeds.

Q. And how much would that be roughly, sir?

A. We're talking 72 million, so in excess of $2 million.

Q. What did you do after receiving the call -- after having this phone call with Mr. McBride?

A. I realized that nothing had been set aside.

Q. What did you do next?

A. Well, I then checked with Mr. McBride on how much he had in what -- what we described as his or what he described as his reserve accounts, and he told me that he had $600,000 set aside in his reserve accounts that was available to take.

Q. I was going to ask you what -- what are these reserve accounts, or what did you understand him to be referring to when he talked about reserve accounts?

A. On every transaction done in the United States, we held back funds at the American Publishing level in order to accommodate claims made by the buyers of us, of us the seller for -- for things that -- things that they -- we may have [7837] missed and working capital adjustments and things of that sort.

Q. A couple more questions.

Were payments eventually made to executives from the Paxton and Forum deal proceeds, from these reserve accounts you described?

A. Yes, they were.

Q. How did you decide how much to pay out to the individuals?

Well, who were the payments made to?

A. They were made to the same four people.

Q. How did you decide how much to pay out to the individuals?

A. They were based on the same formula as the previous payment.

Q. When you say the previous payment, what are you referring to?

A. I'm referring to the CNHI payment.

Q. And who were the individuals that we're referring to, just to be clear?

A. Mr. Atkinson, Mr. Boultbee, Mr. Black and myself.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
Vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
Defendants,	)	May 9, 2007 9:00 o'clock a.m.

VOLUME THIRTY-FIVE

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of David Radler

[7928]

BY MR. SUSSMAN:

Q. Now, sir, I think when we left off yesterday, we were talking about specific non-compete payments in the Paxton and Forum transactions; and, we were in the midst of discussing some calls that took place between you and Mr. McBride, I **[7929]** believe.

Do you recall what I'm referring to?

A. Just give me the context. Which ones --

Q. Sure.

A. -- and I will --

Q. Well, I think at some point in time in the spring of 2001, I believe yesterday you testified, that you realized that no money had been set aside for non-compete payments in the Paxton and Forum transactions?

A. That's --

Q. Do you recall that?

A. That's correct.

Q. After, I think, you received a call from either Mr. Black or Mr. Boultbee.

Now, after you realized that no money had been set aside for non-compete payments in Paxton and Forum – in Paxton and Forum transactions -- what, if anything, did you do next?

MR. NEWMAN: Your Honor, if I might, I'm sorry I'm a little slow on the reflexes this morning, but I object to this because I don't believe it's fairly stated what this gentleman testified to about the phone call. I don't believe he included the name of my client in that phone call.

THE COURT: Do you want to clarify that with the witness, Mr. Sussman?

[7930]

BY MR. SUSSMAN:

Q. Sir, do you understand that I'm not -- I'm just trying to give you my recollection of where I thought we were to orient you. Do you understand that?

A. Yes, I do.

Q. Okay.

And when you responded is that -- when you responded was it that what I was saying was true, or that you understood that I was trying to orient you and where I was trying to orient you to?

A. No, I was trying to say that that was true.

Q. Okay.

Well, let's go back, then, to after you were advised that there was not -- there had not been money set aside in the reserves, what did you do next?

A. Well, having called Roland McBride and determined that there was no non-compete money set aside, I then received a calculation from Roland -- which I had asked for, from Roland -- McBride on just how much of the reserve accounts that he had set up for the -- for the -- transaction clawbacks, which were possible under -- under -- any transaction.

There was always the potential for clawbacks from the -- from the -- buyer.

And he told me that he was -- he had at least $600,000 free in that amount -- in those deals.

[7931]

Q. Now, did you speak to anyone else about the fact that money had not been set aside for these non-competes?

A. I believe I spoke to, to the best of my recollection --

MR. GENSON: Objection, again, to belief.

THE COURT: Sustained.

BY MR. SUSSMAN:

Q. Did you speak to anyone else about the subject, sir?

A. To the best of my recollection, yes.

Q. Who did you speak with?

A. I spoke to Mark Kipnis.

Q. Did you speak to Mr. Kipnis on the phone or in person?

A. In person. I -- I -- to the best of my recollection, it was in person.

Q. Was anyone else present during this conversation with Mr. Kipnis?

A. To the best of my recollection, no.

Q. Sir, what did you say to Mr. Kipnis and what did Mr. Kipnis say to you?

A. Well, I asked Mr. Kipnis what had happened to the Forum and Paxton non-competes; and, he indicated that he had forgotten about the Forum -- the Forum -- and Paxton non-competes, and that they -- it was a very busy time; he had been busy; and, they had -- nothing had been done.

Q. What did you do after having this discussion with Mr. Kipnis?

[7932]

A. Having determined that there was no non-competes, but I did realize at that point that there was the $600,000, and I made a decision to allocate the 600,000.

Q. And how did you make the decision to allocate the 600,000?

A. Well, I knew there was the 600,000; and, then, I asked -- I asked -- Mr. Black for his opinion on what allocation should be made.

MR. GENSON: Objection. Foundation, please.

BY MR. SUSSMAN:

Q. When you say you asked Mr. Black, was this -- did you have a phone call or an in-person conversation with Mr. Black?

A. It was by phone.

Q. Okay.

And do you recall the date of that conversation?

A. No, I don't.

Q. Okay.

What did you -- was there anyone else on the telephone during this conversation?

A. To the -- to the -- best of my knowledge, no.

Q. What did you say to Mr. Black and what did Mr. Black say to you?

A. I told Mr. Black that there was only $600,000 left and -- and we -- and that that could be allocated. And he agreed. And we allocated the 600,000.

Q. How did you allocate the 600,000?

[7933]

A. To the best of my recollection, I think it was 285, 15, 285, 15.

Q. And who were those amounts allocated to, sir?

A. They were allocated to -- to Mr. Black, to Peter Atkinson and to Mr. Boultbee.

Q. And what amounts were allocated to what individuals?

A. 15,000 to Mr. Atkinson and 15,000 to Mr. Boultbee.

Q. Now, let me show you what's in evidence as Government Exhibit Supplemental Payment 1.

MR. SUSSMAN: Your Honor, request permission to publish?

THE COURT: You may.

MR. SUSSMAN: Thank you.

BY MR. SUSSMAN:

Q. And this is a memo to Lisa Morse from Roland McBride.

Who is Lisa Morse, sir?

A. I don't know.

Q. And it's dated April 6, 2001?

A. That's correct.

Q. And the cc's, if you can go down to that, cc'd to yourself and Mark Kipnis, correct?

A. That's correct.

Q. It says, "Please issue supplemental non-competition payments to the following individuals"; and, then, it has the list of individuals and the list of numbers.

[7934]

And, then, it states, "This is to be charged against the remaining sale reserves for Paxton and Jamestown."

What is Jamestown, sir?

A. Jamestown is -- is -- the Forum transaction.

Q. Forum.

Now --

MR. SUSSMAN: One moment.

(Brief pause.)

BY MR. SUSSMAN:

Q. Did you, in fact, receive your payment from the -- supplemental non-competes from the -- Paxton and Forum money?

A. Yes, I did.

Q. Did you ever sign a Non-Competition Agreement in the Paxton and Forum transaction?

A. No, I didn't.

Q. Directing your attention to the fall of 2003, did you have a conversation with anyone about the Non-Competition – the actual Non-Competition -- Agreements in the Paxton and Forum transaction?

A. Yes, I did.

Q. Who was that with?

A. It was with Mark Kipnis.

Q. Was this in person or over the phone?

A. It was in person.

Q. And who was present for this conversation?

[7935]

A. To the best of my recollection, it was just Mark Kipnis and myself.

Q. What did you say to Mark Kipnis and what did Mr. Kipnis say to you?

A. I asked Mark Kipnis what had happened to the Paxton and Forum non-competes; why hadn't they been signed.

Q. Now, when you say the non-competes, are you referring to the money or the agreements themselves?

A. The agreement -- I was talking about the – the agreements.

Q. And what, if anything, did Mr. Kipnis say?

A. He told me that he hadn't gotten around to producing the non-competes and -- and -- that there was no Non- -- there wasn't a Non-Compete Agreement.

Q. Did you have an understanding as to whether the $600,000 in payments for the Paxton and Forum non-competes were related-party payments?

A. Yes, they -- I considered them -- I considered them related -- related-party payments.

Q. And did you have this understanding on or around April of 2001?

A. Yes, I did.

Q. Did you ever advise the Board or the Audit Committee of Hollinger International about those payments?

A. No, I didn't.

[7936]

Q. Why not?

A. Well, I -- I -- didn't think -- first of all, the buyers hadn't really requested the non-compete payment; and, secondly, I knew that the non-compete -- the process of creating this non-compete -- payment was wrong.

* * * * *

[7940]

Q. Sir, who prepared the Non-Compete Agreements for APC?

A. Mark Kipnis prepared them. [7941]

Q. And did you read your Non-Compete Agreement in APC at the time you signed it?

A. Yes, I did.

Q. What was your understanding of what you agreed not to compete with?

A. I agreed not to compete with American Publishing for a period of -- and I'd have to go back to the agreement, but it was -- either three years or -- assuming it was three years. I'd have to go back to it, though, to look at it.

Q. At the time you signed your agreement, sir, what, if anything, did you understand what, if any, areas of the United States did you understand that you would be prohibited from operating a newspaper in?

A. Well, the only newspaper that -- that -- American Publishing still retained at that point was a newspaper in Mammoth, California.

Q. And beyond that newspaper, sir, what understanding, if any, did you have about what you would not be allowed to compete with?

A. That would have been it.

Q. Now, sir, let me direct your attention to what's in evidence -- and I'll just have you look up on the screen -- as Government Exhibit Filing 9-c.

And I will direct your attention, for the record, to Disclosure page 6. [7942]

MR. SUSSMAN: And for everyone else who has not memorized the exhibit numbers, this is the 10-K for Hollinger International filed in April of 2001. So, it is a 2000 10-K.

If you can go to the bottom paragraph under "Community Group."

(Brief pause.)

MR. SUSSMAN: I'll read under "Community Group."

"During 2000, the company sold virtually all of its remaining United States community newspapers for proceeds of approximately $215 million. Only one United States community newspaper was still owned at December 31st, 2000."

Sir, was this consistent with your understanding when you signed the APC Non-Compete Agreement in early 2001.

A. Yes, it -- it -- is.

MR. SUSSMAN: And, your Honor, if I could show the witness what's in evidence as Government Exhibit APC 18?

THE COURT: You may.

(Document tendered.)

BY MR. SUSSMAN:

Q. Sir, do you recognize APC 18?

A. Yes.

Q. What is APC 18?

A. It's a copy of the Mammoth Times.

Q. And what's the date of that publication?

A. This one is February 1st, but I don't know what year. I [7943] can't find the year.

February 1st, 2001.

MR. SUSSMAN: Your Honor, at this time the government would ask to publish this newspaper briefly to the jury.

THE COURT: You may.

MR. SUSSMAN: Thank you.

(Document tendered to the jury.)

(Brief pause.)

BY MR. SUSSMAN:

Q. Sir, is that newspaper, APC 18, the Mammoth Times, the newspaper -- did you understand whether that was the newspaper you were paid $2.6 million not to compete with?

A. That's correct.

Q. Now, was the Mammoth Times eventually sold?

A. Yes, it was.

Q. To what entity?

A. It was eventually sold to Horizon.

Q. Is Horizon the entity that -- who was -- who were -- at that time was that the entity that you and Mr. Black were owners of -- part owners of?

A. Yes, that is.

Q. How much was Horizon sold for?

A. It was sold for a dollar, plus working capital.

Q. What did you understand --

MR. SAFER: I'm sure -- your Honor, I'm sure -- that **[7944]** that was a miscommunication there. I don't think Horizon was sold for a dollar.

MR. SUSSMAN: Mr. Safer is right, your Honor. I misspoke.

THE COURT: Okay.

BY MR. SUSSMAN:

Q. How much was the Mammoth Times sold to Horizon for?

A. It was sold for a dollar, plus working capital.

MR. SUSSMAN: Thank you, Mr. Safer.

BY MR. SUSSMAN:

Q. What did you understand to be the purpose of the Non-Compete Agreement that you signed, sir, in APC?

A. Well, the purpose?

Q. Yes.

A. Well, I'd have to go back to the -- the purpose was -- it was a tax-generated non-compete.

Q. What do you mean when you say a "tax-generated non-compete"?

A. This was a -- this was a -- bonus that Mr. Black had authorized for the executives in this -- the executives that were--

MR. GENSON: Judge, objection to foundation. I don't know, what he says Mr. Black authorized, what he's referring to. We have no foundation.

THE COURT: Mr. Sussman? [7945]

MR. SUSSMAN: We already discussed an earlier conversation with Mr. Black.

MR. GENSON: Well, I didn't hear Mr. – I didn't hear that conversation – what was said in that conversation did not appear to comport with what he just said.

MR. SUSSMAN: Well, let me ask –

MR. GENSON: I would object.

THE COURT: Mr. Sussman?

MR. SUSSMAN: Let me see if he can direct the witness to the specific question.

THE COURT: Okay.

BY MR. SUSSMAN

Q. Which is, sir: Why did you understand that you were signing a Non-Compete Agreement in this – for APC for your $2.6 million?

A. I was signing it because this was a tax – there was a tax – benefit in signing it.

Q. What was your understanding of what the tax benefit of signing the non-compete was?

A. That there was a good chance that it would be tax-free in Canada.

Q. What would be tax-free, sir?

A. The non-compete payment.

Q. Did you – at the time you signed this Non-Compete Agreement, did you – have any intention of competing with any [7946] newspaper that APC owned?

A. No, I didn't.

Q. In fact, what was happening to APC as of February of 2001?

A. Well, as of February, 2001, APC had – really had – there was nothing left in it.

Q. And APC, itself, who was on the Board of APC?

A. I would have to look at the list, but I was on the Board and Conrad Black was on the Board. But I would have to look at the list for the others.

Q. So sir, did you under- -- did you have an understanding – let me back up.

Is it fair to say that you received your $2.6 million for agreeing not to compete against a newspaper company that you were on the board of?

MR. ROMANO: Objection, leading.

MR. GENSON: Objection. Leading.

THE COURT: Sustained

BY MR. SUSSMAN:

Q. Sir, did you report your $2.6 million payment in the APC transaction on your income taxes?

A. No, I didn't.

Q. Why not?

A. Because I was advised by tax counsel that it wasn't required.

Q. Now, what, if anything, did you tell your tax counsel [7947] about the fact that this was a Non-Compete Agreement set up solely for tax reasons?

MR. SAFER: Your Honor –

MR. GENSON: Objection.

MR. SAFER: -- Mr. Radler's conversations with his tax counsel are hearsay, irrelevant –

MR. SUSSMAN: I don't think they are irrelevant, your Honor.

MR. GENSON: They certainly are hearsay.

THE COURT: Well, how are they not hearsay?

It is one thing to say what his state of mind was and why he did or did not do something, but why is not his conversation with his tax counsel hearsay?

MR. SUSSMAN: Let me rephrase.

THE COURT: Okay.

MR. SUSSMAN: Let me see if he can rephrase the question, your Honor.

BY MR. SUSSMAN:

Q. Did you advise the Audit Committee or the Board of Directors for Hollinger International that you had received -- that you and other executives had received -- $5.5 million payment for agreeing not to compete with an International subsidiary?

A. No, I didn't.

Q. Why not? [7948]

A. well, at the time of the -- of the -- issuance of these checks, I was not aware that I was actually issuing money that belonged to Hollinger

International, as opposed to money that belonged to Ravelston.

Q. And did you advise -- at any point in time -- the Board that you had signed these Non-Compete Agreements?

MR. GENSON: Objection. Asked and answered.

THE COURT: Sustained.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
v.	)	
CONRAD M. BLACK, JOHNnA. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 9, 2007
Defendants,	)	2:00 o'clock p.m.

VOLUME THIRTY-FIVE

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Cross-Examination of David Radler

[8125]

Q. In fact, the paper went from being broke to earning a profit of $150,000 a year within only two years of your taking over the paper, isn't that right?

A. That's correct.

Q. And as you started to turn a profit with the Sherbrooke Record, you realized that you were pretty good at the newspaper business, right?

A. That's correct.

Q. And you and Conrad Black then set your sights on buying other newspapers, correct?

A. That's correct.

Q. You kept the Sherbrooke Daily Record and decided to buy more papers, this time in western Canada, right?

A. That's correct.

* * * * *

[8131]

Q. Now, by the time of the CanWest sale in 2000, you had amassed a collection of over 300 community newspapers throughout eastern and western Canada, isn't that right?

A. You're not distinguishing between dailies and weeklies, but that's fine. There were 300 titles.

* * * * *

[8142]

Q. Between 1986 and 1992, the group that you led spent $302,100,000 by buying 288 newspapers in over 20 states in the United States, correct?

A. The numbers are -- I can't -- I don't count the numbers the way you do, but I -- I will accept your -- your numbers.

Q. In just over a decade, you closed over 100 separate newspaper deals in the United States, right?

A. That's correct.

Q. That's almost one a month for ten years, right?

A. If -- you are lumping a lot of newspapers together. Sometimes a deal, one deal could have meant eight newspapers.

Q. You went to small towns all over the United States looking for newspapers, correct?

A. Yes.

Q. Towns like Kirksville in Macon, Missouri.

A. Yes.

* * * * *

[8159]

BY MR. GREENSPAN:

Q. Shortly after you began acquiring papers in the United States, Conrad hit the jackpot with the investment in the Daily Telegraph of London, isn't that correct?

A. That's correct.

Q. Hmm?

A. That's correct, I just said.

Q. All right, okay.

So once again, his connections paid off, right?

A. Yes.

Q. It was his connections at Bilderberg that got him The Telegraph, right?

A. I wasn't sure it was Bilderberg, but it was certainly his connections.

Q. You're familiar with the Bilderberg conference, aren't you?

A. I'm aware that Conrad attends the Bilderberg conference.

[8160]

Q. Do you know that it's an annual meeting of some of the most influential people in the world?

A. I'm aware of that.

Q. In fact, there are only about 120 to 130 people invited to the conference every year.

A. I didn't know that.

Q. Do you know that people like Henry Kissinger, the former Secretary of State, goes?

A. I accept that he does.

Q. Melinda Gates?

A. Sir, I don't know who goes.

Q. You don't read about it in the papers?

A. I haven't for years.

Q. And Conrad Black was a member as well, right?

A. I knew that Conrad was a member.

Q. And, in fact, it was his attendance at the conference that led him to the purchase of The Telegraph, and you know that, right?

A. I knew that it's his connections that led to the purchase of The Telegraph, but I was unaware that the connections started at the Bilderberg [8161] meetings.

Q. You learned about the opportunity to buy or Conrad learned about the opportunity to buy part of The Telegraph at a meeting in 1985? You knew that?

A. I -- I didn't know that it took place at the Bilderberg meeting, sir.

Q. Didn't you think that it was Henry Kissinger that brought him the idea? Do you know that?

A. I -- I did not -- I thought it was Andrew Knight, but either one. It doesn't matter.

Q. And The Telegraph was having financial problems and was a good target for acquisition, correct?

A. That's correct.

Q. And that wasn't a very widely known fact at the time, was it?

A. I don't know that, sir.

Q. And when Conrad received that tip, within a few months, your company had bought a 14 percent interest in The Telegraph for 20 million pounds, right?

A. I actually thought it was less than that, but I -- I -- that's fine.

Q. Financial problems at The Telegraph were worse than was first thought, right?

A. That's correct.

Q. And so by the end of the year, you owned 57 percent of The Telegraph, right?

A. It was in that range certainly, yes.

Q. And by 1995, International owned it all.

A. Yes.

MR. GREENSPAN: Okay. And there is a demonstrative, [8162] Radler Demonstrative 5, your

Honor. It's a map of England, and I would ask to or seek to publish.

THE COURT: Any objection?

MR. SUSSMAN: No, your Honor.

THE COURT: You may publish.

BY MR. GREENSPAN:

Q. Now, that's England, and what the company bought was the London Daily Telegraph, correct?

A. That's right.

Q. The Weekly Telegraph, correct?

A. The Weekly Telegraph started later, but yes, it was part of the same package.

Q. The Sunday Telegraph, correct?

A. Yes.

Q. And Telegraph Co. U.K., right?

A. Presumably, that was the holding company.

Q. So the purchase of The Telegraph as we look at it was a real coup for the company, right?

A. Yes.

Q. It added a very prestigious publication to your growing empire, didn't it?

A. Yes, it did.

Q. And that was all due to Conrad, right?

A. Yes.

Q. In fact, one media baron thought Conrad's deal was so good **[8163]** that he said, "Black landed history's largest fish with history's smallest hook." Right?

A. I remember -- I don't know who did it, who said it, but, yes, I remember that saying.

Q. And after the purchase of The Telegraph, Conrad moved to London to run it, didn't he?

A. Yes, he did.

Q. Around 1989.

A. That's correct.

Q. Right?

A. Yes.

Q. Set up a home there for his family, and he oversaw the operation of the paper, correct?

A. Yes.

Q. And you recall that it was a difficult time to run a London newspaper, right?

A. Yes.

Q. England was suffering from a recession, and The Telegraph was soon in a price war with Rupert Murdoch, the owner of the rival London Times, correct?

A. That's correct.

Q. And despite these issues, The Telegraph remained competitive, correct?

A. Yes, it did.

Q. And The Telegraph eventually won the price war, right?

[8164]

A. Yes, it did.

Q. Thanks to a victory from Conrad, right?

A. Yes, yes.

Q. And a tremendous victory for Conrad, correct?

A. Yes.

Q. Tremendous victory for you, correct?

A. Yes.

Q. And a tremendous victory for the shareholders, correct?

A. Yes.

Q. And Hollinger owned The Telegraph until 2004, right?

A. Yes.

Q. And it was sold for 1.2 billion US dollars?

A. I believe that's the number, yes.

Q. And the initial investment of 20 million pounds turned into $1.28 billion.

A. I think there were some subsequent investments that were added to the 20 million pounds, sir.

Q. But the profit was enormous for International, right?

A. I -- it was --

Q. Enormous.

A. It was in the hundreds of millions, yes.

Q. Yeah. And that profited International's shareholders, correct?

A. Yes, it did.

Q. You -- I want to talk to you about what you were doing [8165] while Conrad was running The Telegraph.

When Conrad moved to London in 1989, you negotiated the purchase of the Jerusalem Post, correct?

A. Yes, I did.

MR. GREENSPAN: And I have a demonstrative, your Honor, Radler Demonstrative 6. It's a map showing the Middle East.

THE COURT: Is there any objection?

MR. SUSSMAN: No objection, your Honor.

THE COURT: You may publish it.

MR. GREENSPAN: May I publish?

THE COURT: Yes, you may.

BY MR. GREENSPAN:

Q. Now, the Jerusalem Post is in Israel?

A. Yes, it is.

Q. And although it did not make a lot of money, it was a very, very prestigious paper, correct?

A. That's correct.

Q. And it's one of the world's most highly regarded newspapers covering issues in the Middle East, isn't it?

A. That's correct, sir.

Q. And you did this in addition to your acquisition of the U.S. community newspapers, right?

A. Yes, I negotiated that deal.

Q. This was -- this was your baby, right?

[8166]

A. It was -- it was -- well, I took it on operationally, yes.

Q. Uh-huh. And the sole focus of your attention was not only the Jerusalem Post, but you had a focus on the papers in western Canada, right?

A. Yes.

Q. You were -- around 1992, you began working on a deal that would elevate your profile even higher in the United States, right? And that was the purchase of the Chicago Sun-Times group of newspapers, right?

A. That's -- that's correct.

Q. Sun-Times deal was a very hard negotiation, wasn't it?

A. Yes, sir.

Q. You made over 13 trips to Chicago to land the deal?

A. Yes.

Q. In fact, on one of your trips, the chairman of the Sun-Times even tried to tell you the Sun-Times was not for sale. Remember that?

A. Yes.

Q. You asked him why you were in this stinking airport boardroom if the newspaper was not for sale. Do you remember that?

A. Yes. I asked him why he was there. I knew why I was there.

Q. You knew why you were in that stinking airport?

A. Yes, I knew, but I asked him why he was there if it wasn't [8167] for sale, sir.

Q. And that comment, you believe, got him to alter his position?

A. Oh, I think the position had been altered long before I made that comment.

Q. But it still took a couple of months to close the deal, right?

A. Yes.

Q. And it was worth it in the end, wasn't it?

A. Yes, it was.

Q. The purchase of the Sun-Times solidified your presence in the United States as a newspaper publisher, right?

A. Well, it solidified the company's presence in the United States as a major big city publisher.

Q. I'm talking about your presence. I specifically talked about your presence --

A. My presence? Well, I took on the publisher's role in about 1996 or '5, I'm not sure.

Q. And the purchase of the Sun-Times solidified your presence in the United States as a newspaper publisher, correct?

A. That's correct.

Q. And you didn't stop there, did you? Because between 1994 and 2000, you bought more than 100 papers in metropolitan Chicago, correct?

A. No. Between 1994?

[8168]

Q. And 2000.

A. Well, the original Sun-Times deal, because we are in Chicago, the original Sun-Times deal included a number of weekly papers. It included the Pioneer Group in the north suburbs. It also included a number of southern suburbs, too.

Q. The Daily Southtown?

A. The Daily -- no, the Daily Southtown was a separate deal.

Q. All right. But you were the one that bought more than -- around 100 papers in metropolitan Chicago, correct? You did that.

A. From the -- from the Sun-Times.

Q. Yes.

A. Yes.

MR. GREENSPAN: So I wonder if, your Honor, if I can ask the witness to look at Black Exhibit General 26.

THE COURT: Certainly.

MR. GREENSPAN: It's in the front insert pocket of your binder.

Now --

THE WITNESS: I think some things fell down.

THE COURT: Ron, could you grab those for him, please? Thank you.

THE WITNESS: I have Black insert --

BY MR. GREENSPAN:

Q. Do you recognize the document, sir?

A. I don't recognize the document, but it's fine. I'm seeing -- I may have seen it before, but to me it's a new document.

Q. And would it be fair to say that some of the newspapers that you owned included the Lake Zurich Courier, The Evanston Review, the Palatine Countryside and the Blue Island Star?

A. I wasn't at that page.

MR. SUSSMAN: Just object to the form of the question as to who the "you" is that you owned.

MR. GREENSPAN: Who the "you" is, okay.

THE COURT: Mr. Greenspan?

MR. GREENSPAN: Okay.

MR. SUSSMAN: Just to clarify.

THE WITNESS: I don't --

THE COURT: Wait, wait, wait. There's an objection.

MR. GREENSPAN: I'll change my question.

THE COURT: Okay.

BY MR. GREENSPAN:

Q. The -- first of all, this document is a document that lists Hollinger International newspapers, their locations and their circulation figures, right?

A. Yes.

Q. Okay. And in terms of some of the newspapers that Hollinger International lists and owned is the Lake Zurich Courier, The Evanston Review, Palatine Countryside, Blue [8170] Island Star, right?

A. I am trying to find those on the list, sir.

Q. Well, let me help you. You don't know that without seeing it on the list, would that be fair?

A. I -- it's -- it's more comforting for me to see the list because I don't --

Q. All right. Then why don't we go to the list.

Can you move to page HLR 675054, which is the second-to-the-last page.

A. Yes.

MR. GREENSPAN: Your Honor, I think I may have reached a point where I should have asked you to move it -- I'd like to move it into evidence.

THE COURT: Is there an objection?

MR. SUSSMAN: Your Honor, I don't think there's any foundation to move this into evidence at this point in time.

THE COURT: Sustained. You need to lay a little bit more. He had said he had not seen this yet, but see if you can lay a foundation that he can testify to its accuracy.

MR. GREENSPAN: All right.

BY MR. GREENSPAN:

Q. First of all, in terms of this Black General 26, do you recognize the document, first of all?

A. No, I don't recognize the document, but I recognize some of the -- some of the –

[8171]

Q. All right.

A. -- material in it.

Q. When you look at it, are you able to tell us whether or not in looking at all the pages in it, whether or not it's the type of document that is kept in the ordinary course of business at Hollinger International?

If you could just look at it for a moment, go through it fairly quickly, but just look at the --

A. Kept at Hollinger International where, sir?

Q. That it's kept by Hollinger International in the ordinary course of business.

MR. SUSSMAN: Objection, foundation for this witness.

THE COURT: Overruled.

If can you answer, yes or no.

BY THE WITNESS:

A. I don't know where it was kept, so I don't know. It's the first time I'm seeing this particular document, and I don't know where it was kept.

BY MR. GREENSPAN:

Q. So this document has no meaning to you when it talks about the first quarter of 2000 circulation? You don't -- you've never seen that before?

[8172]

A. No, I -- I haven't seen this particular document.

Q. And the second page, when it says IQ 2000 circulation list, you've never seen that before?

A. No, not in this form, certainly not.

Q. And what about the next page that lists publication paid daily city province circulation numbers?

MR. SUSSMAN: Your Honor, I'm going to object to form and say asked and answered at this point. The witness has testified he does not recognize the document.

THE COURT: Overruled.

You may, Mr. Greenspan, want to see if he can verify the content, the accuracy of the content.

BY MR. GREENSPAN:

Q. Really just in terms of looking at this, would you not agree with me that this lists an awful lot of papers and an awful lot of provinces in Canada and an awful lot of places in the United States?

A. Yes, I agree with that, yes.

Q. And you've never seen it before.

A. No.

Q. Is that what you're saying?

A. That's correct.

Q. All right. But it is the case that the company, International, owned all of the papers that I've referred to the Lake Zurich Courier, The Evanston Review, the Palatine Countryside and the Blue Island Star, right?

A. I'd have to go and look at those. That's -- that was that section, you gave me the page. 54 it ended in, didn't it?

[8173]

And I can't read the headline on that grouping. It's all -- it's all black.

Q. So you were producing in terms of numbers of people that were part of the circulation hundreds

and hundreds of thousands of paper a day in the Sun-Times, in community newspapers and the printing press that you ran, right?

A. In the printing press?

Q. You -- you ran a printing press, didn't you?

A. I personally didn't run a printing press, but --

Q. You didn't personally run it?

A. No, I didn't.

Q. Okay. Maybe I should be more -- I always -- I apologize if you read it that way or interpreted my question that way. I did not try to suggest to you that you went to the printing press and put on a pair of jeans and ran it.

When I was putting the question to you in terms of you running a printing press, what I meant was is that you controlled the printing press. You were in charge of the printing press.

A. There were many printing presses in Chicago, sir.

Q. All under your domain, correct?

A. Under my management, yes.

Q. Yes. So what I want to get to then is -- is American Publishing Company eventually became the second largest newspaper company in the United States, right?

[8174]

A. No, sir.

Q. No?

A. No.

Q. Third?

A. I don't even know whether it was third.

Q. You don't know that.

A. No.

Q. So if I were to say to you --

A. I mean in what context was it large? Did it have the largest sales? Did it -- would you ask -- I have to know what you're asking.

Q. I see. Well, you can tell me whether it was the second largest anything in the United States?

A. I don't know where the second largest came from; but at one point, it was a large publisher in terms of daily newspaper titles, but certainly nowhere near large in terms of revenue.

Q. Well, 1996, American Publishing Company went public.

A. Yes.

Q. It was rechristened Hollinger International, Inc., correct?

A. Yes.

Q. And it was traded on the New York Stock Exchange.

A. Yes.

Q. So by 1996, the business that started with the Sherbrooke [8175] Daily Record had grown into a newspaper empire of more than 500 newspapers on three continents, right?

A. If one includes all titles, yes.

Q. And the growth didn't stop with the Sun-Times, correct?

A. No.

Q. By 1999, Hollinger International owned 59 of the 102 daily newspapers in Canada, right?

A. I thought it was 58, but I --

Q. 58, 59.

A. Okay.

Q. National Post, it was around this time that Conrad wanted to launch a national newspaper in Canada, correct?

A. That's right.

Q. I don't want to try to compare it to -- to any -- anything in the United States because it's obviously a much bigger country, but it would be like a national edition of the New York Times or the Chicago Tribune, right? National edition.

A. I -- yes, okay, yes. It's a little different --

Q. Are you laughing at the question or --

A. I wouldn't have used that phrase. It was a national newspaper. It was a national newspaper, and I don't know that I would compare it to the New York Times or to the Chicago Tribune.

Q. Well, for Canada, for little Canada --

A. Well --

[8176]

Q. -- it was a pretty big deal?

A. It was a big deal, yes, for Canada.

Q. Had some really good writers, right?

A. Yes.

Q. And it was pretty -- in terms of becoming a competitor to the only national newspaper at the time, the Globe & Mail, it came on real strong, didn't it?

A. It certainly did.

Q. And it attracted some of the country's best journalists, right?

A. Yes.

Q. And it was Conrad Black's vision, correct?

A. Yes.

Q. And it was Conrad Black's creation, correct?

A. Yes.

Q. Correct?

A. Yes, I said.

* * * * *

[8178]

Q. You started at the Sherbrooke Daily Record 25 years earlier with about $20,000 in borrowed money, right?

A. No, the 20,000 wasn't borrowed. It was the balance.

Q. 2004, you had built an International newspaper empire with a market cap of several billions of dollars.

A. No, sir.

Q. Over one billion.

A. What year? Over a billion, yes.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
Vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 16, 2007
Defendants.	)	1:30 o'clock p.m.

VOLUME THIRTY-NINE

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Cross-Examination of David Radler

[8992]

Q. I'd like to talk for a minute about APC.

The government asked you about money paid to you, Conrad Black, Jack Boultbee and Peter Atkinson for APC.

Do you recall that?

A. Yes.

Q. You received roughly $2.6 million, correct?

A. Yes.

Q. Mr. Black received roughly 6 -- $2.6 million?

A. Yes.

Q. Mr. Atkinson and Mr. Boultbee each received $137,500, correct?

A. That's correct.

Q. You testified on direct examination that at the time of the issuance of these checks, you were not aware that you were actually issuing money that belonged to Hollinger as opposed to money that belonged to Ravelston.

Do you recall giving that testimony?

A. Yes.

Q. Mr. Sussman did not ask you why you believed that the money paid out of the APC belonged to Ravelston, but I'd like [8993] to explore that with you for a moment.

You believed, did you not, that the APC payments were money that belonged to Ravelston because you understood that the APC payments represented a payment of management fees that had already been approved by the Audit Committee, correct?

A. Yes.

Q. And you understood that the Non-Compete Agreements were signed in connection with these payments in the hope that the recipients would minimize the taxes they'd have to pay, correct?

A. Say that -- there was a -

Q. You understood that the Non-Compete -

A. Right.

Q. -- Agreements were signed in connection with these payments in the hope that the recipients would minimize the taxes they'd have to pay?

A. Yes.

Q. Now, let's focus on management fees APC was supposed to pay in 2000.

I think you described it as a two-step process. Your responsibility was to meet annually with Governor Thompson and make a presentation regarding management services fees for Ravelston for the upcoming year, correct?

A. Yes.

Q. Once Governor Thompson agreed, the proposed fee would then [8994] be presented to the Audit committee by Governor Thompson, as you described it, correct?

A. Yes.

Q. And I think you also said that with minor variation, Governor Thompson, at least as far as you were -- when you were -- involved in the process, always agreed with the recommendation you made to him?

A. Yes.

Q. Now, after the fees for the year were approved, an allocation has to be made by someone to the various International entities, correct?

A. Yes.

Q. You were not involved in the allocation process, correct?

A. That's correct.

Q. You understood that someone would have to determine how much of the management fee expense would be assigned for payment by each of the subs?

A. Yes.

Q. One of the subsidiaries of International that received management services was APC, correct?

A. Yes.

Q. That was the case in calendar year 2000?

A. Yes.

Q. Now, you attended the Audit committee meeting on February 22nd, 2000. Do you recall that?

[8995]

A. Right. I would have to be –

Q. All right.

A. Yeah.

Q. Let me ask you to look at Tab 49.

Tab 49 has been marked Atkinson Audit 23, and they're the Minutes of the Audit committee meeting of February 22nd, 2000.

Do you recognize the Minutes?

A. Yes.

MR. ROMANO: It might be easier, your Honor, if I just offer them.

THE COURT: Any objection?

MR. SUSSMAN: No objection.

MR. NEWMAN: No objection.

MR. GENSON: No objection.

MR. SAFER: No objection, your Honor.

THE COURT: I will admit it, and you may publish it.

MR. ROMANO: Thank you, your Honor.

BY MR. ROMANO:

Q. Now, these Minutes are what we call Minutes of the Annual Meeting of the Audit committee, correct?

A. Yes.

Q. Early in the year, usually in February, the Audit Committee meets with the auditors and they go through the [8996] annual ritual of retaining the outside audit firm and reviewing the audit plan for the year, correct?

A. Yes.

Q. Representatives of KPMG were present at this meeting, correct?

A. Yes.

Q. Pat Ryan?

A. Yes.

Q. Jim Winikates, someone called Dan Creamean?

A. I don't -- I knew Pat Ryan, so I didn't know the others.

Q. They made a presentation about their auditing procedures and their major areas of audit, as they usually do annually, correct?

A. Yes.

Q. The Audit committee appointed KPMG as the auditors for the year 2000, correct?

A. I think the -- I think they would recommend them, right?

I don't know that they could appoint them, but --

Q. Fair enough.

Recommended the appointment of KPMG for the year 2000, and they were ultimately appointed, correct?

A. Yes.

Q. The Audit Committee also approved a 2000 annual payment of $24 million for the management services by Ravelston to International, correct?

[8997]

A. I'm just looking that up.

Q. It's on the second page under Item 6 -- Roman VI.

A. Yes.

Q. And the Audit committee approved a recommendation to the Southam Board that it approve a 2000 annual payment of $18.5 million for services provided by Ravelston to Southam, correct?

A. Yes.

Q. Now, you told Mr. Sussman that you had a conversation with Conrad Black in late December, 2000, or early January, 2001, about payments to executives totalling $5.5 million.

Do you recall that?

A. Yes.

Q. In early February, 2001, you asked Roland McBride to tell you whether there were proceeds remaining from various U.S. community sales.

Do you recall that?

A. Yes.

Q. Let me ask you to take a look at Tab 50, which is a document marked Atkinson Exhibit APC 5.

Do you see that?

A. Yes.

Q. Now, that's a memo from Roland McBride to you dated February 2, 2001, discussing unallocated reserves from various transactions. [8998]

Do you see that?

A. Yes.

MR. ROMANO: Your Honor, the gov- -- your Honor, Mr. Atkinson -- offers Defendant Exhibit APC 5 Atkinson.

THE COURT: Any objection?

MR. SUSSMAN: One moment, your Honor.

(Brief pause.)

MR. SUSSMAN: No objection, your Honor.

MR. SAFER: No, your Honor.

MR. CORBETT: No, your Honor.

MR. NEWMAN: I think it may -- I'm sorry.

MR. ROMANO: Is it already in?

MR. NEWMAN: The answer to my question may be answered.

MR. SUSSMAN: I think Mr. Newman's right. It looks familiar to me at least.

MR. ROMANO: I'm happy to use the other number just to not clutter the record or --

MR. GENSON: Either way, there's no objection.

MR. ROMANO: -- cause any confusion.

THE COURT: Mr. Genson, was there an objection from you.

MR. ROMANO: JB General 16, apparently.

THE COURT: Okay.

BY MR. ROMANO:

[8999]

Q. This exhibit goes by two different names, Mr. Radler..

MR. NEWMAN: Anyway, I remembered one of my exhibits, Judge.

MR. ROMANO: May I proceed?

THE COURT: You may.

BY MR. ROMANO:

Q. Now, in this memorandum, whether it's JB General 16 or Atkinson APC 5, you're asking Mr. McBride for information about unallocated reserves, correct?

A. Yes.

Q. Now, a reserve is an amount that's set aside for future use, correct?

A. Yes.

Q. It's common when selling newspaper assets, isn't it?

A. Yes.

Q. An unallocated reserve is a reserve that's been – not been -- identified for a specific purpose, correct?

A. Yes.

Q. You understood that APC had liabilities in 2000 for which it had set aside reserves, correct?

A. Yes.

Q. One of APC's liabilities was its obligation to pay a portion of the Ravelston management fee, correct?

A. Would you repeat that question?

Q. One of APC's liabilities was its liability -- one of its [9000] obligations -- was to pay a portion of the Ravelston management fee?

A. Yes. I prefer "obligation." I agree.

Q. And the fee for 2000 had been approved by International's Audit Committee. we just saw that, correct?

A. Yes.

Q. So, on February, 2001, you instructed Roland McBride to make four payments totalling $5.5 million to you, Mr. Black, Mr. Boultbee, Mr. Atkinson effective year-end 2000, correct?

A. Correct. Correct.

Q. And you take a look at Tab 7 in the other binder, a document we've talked about already. It refers to a direction that you had given Mr. McBride.

Do you see that?

A. Yes. Yes, I do.

Q. Each of the recipients of these payments -- you, Conrad Black, Jack Boultbee and Peter Atkinson -- were then employed by Ravelston, correct?

A. Yes.

Q. You referred to these payments as bonuses that had been authorized.

Do you see that?

A. Just a moment.

In -- in Tab 7?

Q. Earlier in your testimony. [9001]

A. Yes.

Q. Now, by signing -

MR. SUSSMAN: One moment.

BY THE WITNESS:

A. I'm sorry, I -- that's -

(Brief pause.)

BY MR. ROMANO:

Q. Now, by signing the APC Non-Competition Agreement, there was a good chance -- or at least a reasonable prospect – that the payment would be free of taxes in Canada, correct?

A. Yes.

Q. And when you gave the instruction that you gave, you understand -- you understood -- that the payment was part of unpaid, but approved management fees owed to Ravelston, correct?

A. Yes.

MR. ROMANO: May I have a moment, your Honor?

THE COURT: Yes.

(Brief pause.)

MR. ROMANO: I have no further questions.

* * * * *

[9154]

Q. Now, the -- there was a memo that you've seen, a payment memo of April 6th, 2001, and I'm afraid I didn't note the exhibit, but I think it's supplemental -- Government Exhibit Supplemental Payment 1.

You recall being asked about this exhibit, correct?

A. Yes.

Q. You do not recall seeing this memo on or about April 6th, 2001, do you?

A. Well, this is from Roland McBride to Lisa. No, I would not have seen it on April 6th. [9155]

Q. You see it carbon copies you?

A. Yes.

Q. Do you see that?

A. Yes.

Q. You do not recall seeing this memo on or about April 6th, 2001, do you?

A. Sir, I'm not sure.

Q. Did you tell the FBI on December 10th, 2004, that you did -- that you do not –

A. I --

Q. -- that you did not recall seeing this memo at or around the date that it was apparently authored, April 6th, 2001?

A. Sir, can I see that, given --

Q. Showing you again Kipnis Exhibit Radler 12-9 and 10, 2004, and I will direct your attention to page 27, the second full paragraph.

A. Okay. Yes. I --

Q. Did you tell the FBI that you did not recall seeing this memo at or around the date it was apparently authored, April 6th, 2001?

A. Yes.

Q. And that's true, isn't it?

A. Yes.

Q. You do not recall seeing -- you do not recall that you saw this memo on or around April 6th, 2001, right? **[9156]**

A. Sir, I may have had other material post that date, but as of that date, that's what I said.

Q. You don't recall telling Mark how to distribute the non-competition payments related to the Forum and Paxton sales, do you?

A. Do I recall telling him that?

Q. Right.

A. No.

* * * * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
Vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
Defendants.	)	May 17, 2007 9:00 o'clock a.m.

VOLUME FORTY

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

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Recross Examination of David Radler

[9356]

Q. Okay.

Now, Pioneer was a group of newspapers within the -- I'll say the -- ambit of the Illinois area?

A. Yes.

Q. And were they a group of newspapers that were, in fact, bought, it not entirely but partially by International or APC?

A. They were bought by International, I believe.

Q. I'm sorry, sir, I couldn't hear you?

A. I thought they were bought by International, yes.

Q. Was it all of Pioneer, that was bought by International?

A. Just a moment.

Pioneer, it's an old deal; but, yeah.

Q. Was it a large number of newspapers?

A. Yes.

Q. More than the 59 that were piled up here?

A. I can't remember.

Q. Can't remember?

A. The titles.

Q. Fair enough.

I think you told me, however, on cross-examination that when I showed you the list of 59 newspapers, you said [9357] there were many more at the time that you were terminated?

A. That's correct.

Q. And you couldn't guess for me, you thought somewhere in the neighborhood and you gave me, I think, seven dailies or something like that and maybe a hundred of some other kind.

Was that a fair summary?

A. That's a fair summary, yeah.

Q. Now, sir, it's fair, is it not, that the newspapers that International bought from Pioneer of which this was a part was a very valuable asset?

A. Yes.

Q. Of International's?

A. Yes.

* * * * *

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
v.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	May 31, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FORTY-SEVEN
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

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Cross-Examination of Jennifer Owens

[11369]

[Q.] In other words, you don't know whether this came from Hollinger's offices; you don't know whether this came from documents that were at the

Telegraph offices; you don't know whether this came from a secretary's desk; you don't know exactly where this document came from, do you?

A. No, but it's clearly from Conrad.

Q. Well, in the sense of it's clearly from Conrad's lawyers, right?

A. You only produce things in your client's possession, custody or control.

Q. Okay.

Well, let's back up for a second.

In your client's custody or control.

Let me ask you: Does Mr. Black know what you produced on his behalf?

A. I don't know what Mr. Black knows.

Q. Well, you've gone -- you've produced about 112,000 documents, right?

A. I did not produce them, but someone did.

Q. They've been produced?

A. Yes.

[11370]

Q. And my question to you: You never had any conversations with Mr. Black about all the documents that have been produced, correct -- going through those 112,000 documents?

A. Have -- I'm sorry, could you --

Q. Have you gone through the 112,000 documents with Mr. Black to talk about what's been produced and what hasn't been produced?

A. No.

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
Vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois May 31, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FORTY-SEVEN

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE AMY J. ST. EVE, AND A JURY

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Direct Examination of Joan Maida

[11433]

Q. Did you get any notice of -- did you receive notice that in fact you were being -- you had to leave the office -- eviction notice?

A. Yes.

Q. And when did you have to leave the office by?

A. The 31st of May.

Q. Okay.

And, so, were you going to continue to work for Conrad Black?

A. Yes, I was.

Q. And where was your office going to be?

A. I was setting up an office at my home.

Q. Now, directing your attention specifically to May 20th, 1995 -- or 2005 -- did you go to 10 Toronto that day?

A. Yes, I did.

Q. Was it a regular workday?

A. Yes, it was.

Q. And you got there about what time?

A. About 9:00 o'clock.

Q. Now, did is Conrad keep any papers or documents in his office?

[11434]

A. No.

Q. And where were the documents kept at --

A. All the --

Q. -- 10 Toronto?

A. -- files were kept in my office.

Q. Now, after you got to 10 Toronto on the Second Floor, what did you do? What did you start doing?

A. Probably I had a coffee, and then I -- I know I -- just did some routine things; and, at some point during the morning, I started packing some boxes. I put some files in some boxes.

Q. And what kind of files did you put in the boxes?

A. My -- my -- files that I had in my office.

Q. And --

A. Personal files.

Q. Were they separate documents or were they in file folders, if you remember?

A. No, files.

Q. And the documents that you put in, had you had any conversation with Conrad Black before you took those documents and put them in the boxes?

A. No, I did not.

Q. Did you have any -- was there any notes, memos, e-mails that suggested which documents you should take?

A. No.

[11435]

Q. Do you know generally the topics of some of the documents you took right now? Do you remember?

A. I took -- I know I took -- files with personal pictures and kid stuff and some of Barbara's files I had.

Q. Were there any files with regard to any of the references -- or any of the residences, I mean --

A. Yeah.

Q. -- of Mr. Black?

A. Yeah.

Q. And could you tell us what that would be?

A. There were files on his apartment in New York.

Q. And what else?

A. There was Palm Beach files.

Q. And anything else?

Do you remember a place called Cottesmore?

A. Cottesmore Gardens?

Q. Cottesmore, yes.

Where was that?

A. Yeah. That was in the UK.

Q. Were those some of the files you took; if you remember?

A. Yes. Yeah.

Q. About how many boxes would you say you had packed in your office; if you know?

A. I think I packed four or five boxes.

Q. Now, where were you going to take these boxes?

[11436]

A. Home.

Q. Oh, by the way, were there some boxes there that had already been packed, in addition to the four or five?

A. Yes, there were. There were a lot of boxes in my office.

Q. And you were going to take them to your home?

A. Well, eventually, I wanted to take them home.

Q. Did you plan, when you came in, to take those boxes to your home that day?

A. No.

Q. Had Conrad, again, told you that you should take any of these boxes to your home?

Did you talk about this specifically?

A. No.

Q. Again, did Conrad choose the documents that you packed?

A. No.

Q. To your knowledge, had he ever looked inside any of the boxes that were packed --

A. No.

Q. -- and in the office that day?

A. No.

Q. Now, going back a little before May 20th, did you have occasion to be familiar with a law firm called Sullivan & Cromwell?

A. Yes.

Q. And who were -- to your knowledge, who were -- they [11437] employed by?

A. Who were they employed by?

Q. Yeah. Who did they work for?

A. Conrad.

Q. And did you have occasion prior to that date to seeing lawyers from Sullivan & Cromwell in your office?

A. Yes.

Q. And can you tell us what they did when they came to your office?

A. Well, they photocopied everything.

Q. How long were they photocopying?

A. They were there a long time. They were there weeks.

Q. A week.

And what they were doing --

A. I would say more than a week. Weeks.

Q. And how many people were there?

A. I don't remember exactly. There were a number of them.

Q. To the best of your knowledge, was there anything in that office that they didn't photocopy?

A. No.

Q. Did you have occasion to have in your office any public filings, 10-Ks, proxies, things like that?

A. I did.

Q. Did they even photograph that?

A. They did.

[11438]

Q. Now, during the previous years -- again, years, a few years before May -- before 2005 -- did you have occasion to have requests from other lawyers to contact you to make copies of documents?

A. People asked me to make copies of documents, yes.

Q. And did you make those copies as requested?

A. Yes, I did.

Q. Getting back to May 20th, again, when you came to the office that day, was it your plan to pack or remove boxes from that office?

A. No. I was just getting ready to move.

Q. Now, were there other people that officed in the building in May of 2005?

A. Yes.

Q. And were these people that worked for Conrad or people that worked for other organizations there?

A. There were -- I'm sure there were other people that worked for -- there were probably lawyers in the building and – and staff.

Q. Did anyone -- did anyone stop by your office to speak with you that day?

A. Yes.

Q. And could you tell us what his name was?

A. Mr. Don Vale.

Q. And what was John -- what was Mr. Vale's job?

[11439]

A. He was the President and Director of the company.

Q. And did you -- had you known Mr. Vale prior to that day?

A. Yes.

Q. Were you familiar with him?

A. Yes.

Q. You had talked to him from time to time?

A. From time to time.

Q. You were friendly, were you?

A. He was -- he was -- friendly, yes.

Q. Did you have a conversation with Mr. Vale at the time he came to your office?

A. I did.

Q. Was there anybody else present at the conversation?

A. No.

Q. Could you give us an estimate as to what time you might have had this conversation with Mr. Vale?

A. I'm not really sure. Maybe around 1:00 o'clock, but I can't say for certain.

Q. Okay.

And do you recall what he said and what you said during that conversation?

A. He passed by my office and he said to me -- he was – he -- he greeted me. He said, "Hello, Joan." He was very friendly.

And he said, "Is there anything I could do for you," [11440] in a very friendly way.

And I said, "As a matter of fact, I'd like to take some files home."

Q. Okay.

And after you said that, did you show him the files or --

A. I did.

Q. And what did he do when you showed him the files?

A. He looked at them.

Q. Now, were you aware generally of a rule -- at least in that building -- relative to getting permission to take files out of there?

A. Yes, I was.

Q. And do you recall how you became aware of it; whether you read it, someone told you; do you know?

A. I don't know. It was -- I think it was pretty much general knowledge that --

Q. And after -- and, so, he -- he went and you said he looked at the file boxes, did he?

A. He did.

Q. And what did he say after he looked at the file boxes?

A. He said I could take them.

Q. At the time that you had this conversation with Conrad -- with Vale, Mr. Vale -- had you spoke to Conrad Black about moving the files?

[11441]

A. I had not.

Q. Had you spoke to Conrad Black as to which files -- as to which files -- you were going to take?

A. No.

Q. At some -- after you had that conversation with Mr. Vale, did you believe you had permission to take those boxes out of the office?

A. Yes.

Q. What --

MR. CRAMER: Objection. Objection.

MR. GENSON: It's her state of mind to show what she did, your Honor.

THE COURT: Overruled.

BY MR. GENSON:

Q. Did there come a time, did anyone come to get the boxes and move them?

A. Yes. I called Mr. Bloomfield, one of the security guards that was working at the -- at there.

Q. And did he come up?

A. Yes, he did.

Q. Did he have something with him when he came up?

A. I'm not certain.

Actually, I'm not even certain if he was on -- he might have been on the floor, but I -- I -- I spoke to him and I asked him if he would take the boxes to my car.

[11442]

Q. And did he take the boxes to your car?

A. Yes, he did.

Q. Did he carry them or did he push them? How did he get --

A. No, he took --

Q. -- the boxes?

A. He -- he -- got a -- a dolly.

Q. And your car was parked, where?

A. Outside the back.

Q. Outside the back?

A. In the parking lot.

Q. In the parking lot.

And how did he gain access to your car; if you know?

A. I would have given him my keys.

Q. And did he take any -- and did you see him leave from your office or from the offices with those boxes, did you?

A. I saw him take them out of my office.

Q. Sometime later -- by the way, did you see him load them in your car?

A. I don't recall seeing him loading them in my car.

Q. Sometimes later, did you receive a call from Mr. Bloomfield?

A. Yes, I -- yes, I think it was him that called me.

Q. And where were you when you received that call?

A. I was in my office.

Q. And at that point, do you remember what Mr. Bloomfield [11443] said to you and you said to Mr. Bloomfield?

A. Yes. He said he had been told to re- -- to bring the boxes back. And I said, "Then bring them back."

Q. Okay.

And at that point of time, did you tell him where to bring the boxes?

A. Yes. I told him to put them inside the back door. I didn't want them in my office. I didn't want any

more boxes brought up. I mean, there were -- I asked him to stack them inside the back door.

Q. Did you go back and talk to Mr. Vale or anybody else after Mr. Bloomfield called you?

A. No, I did not.

Q. After Mr. Vale -- Bloomfield -- after you talked to Mr. Bloomfield, did you have a conversation with Conrad Black?

A. Yes, I did.

Q. Was it by phone or on purpose -- or on person?

A. I spoke to him on the phone.

Q. And was there any -- you recognized his voice. You've talked to Conrad Black many times, have you?

A. Of course.

Q. And could you tell us if anybody else, to your knowledge, was on the phone with him, with you, other than Conrad Black?

A. Not that I'm aware of.

Q. And had you talked to Conrad Black prior to that phone [11444] call on that day?

A. I don't believe so.

Q. And after that phone call, do you recall seeing him -- Mr. Black, I mean.

A. He did come into the office later.

Q. How long after the phone call did he come in?

A. I -- I don't remember how long it was. It was --

Q. Where were you when you first saw him, Ms. Maida?

A. I was in my office.

Q. And did he come into your office, did he?

A. Yes, he did.

Q. Now, did you talk with him?

A. Well, we -- yes. I -- yeah. I don't know what we said exactly.

Q. After he was in your office for a period of time -- did he go anywhere after that conversation?

A. Yeah, he -- he went -- I -- he went somewhere else in the building.

Q. And do you know, how long was he gone, ma'am?

A. Oh, you know what? I really don't know exactly how long. Maybe an hour.

Q. And at some point after that, did he come back?

A. Yes.

Q. Did you have a conversation with him then?

[11445]

A. Yes. He asked me to show --

Q. Well --

A. Sorry.

Q. I got to go through all these things.

A. Excuse me?

Q. Did anyone else -- was there anybody else there?

A. Excuse me?

Q. The conversation, where did this conversation -- the one after he came back -- take place? Where were you?

A. When he came back to the office? I was in my office. He came back --

Q. In your office.

A. -- into -- into his office.

Q. These are rules I got to follow. I'm not very good at it, so you got to help me here.

So, now, after he gets -- after he's in your -- was there anybody present when he had this conversation with you?

A. No.

Q. And what did you say to him and what did he say to you?

A. He wanted to know where the boxes were. I had told him what had happened and that I was -- you know, that I -- that Mr. Bloomfield had put some boxes in my car and that he was told to remove them. And he asked me to show -- "Show me where the boxes were."

Q. All right.

And what did you do?

[11446]

A. I went and showed him where the boxes were.

Q. All right.

At some point when you showed him, did anybody -- did a third party join you?

A. Yes.

Q. Who was that third party?

A. John Hillier.

Q. And John Hillier was his driver, was he?

A. That's right.

Q. Had you seen John Hillier before you go in to see – to look at -- for the boxes? Did you see him before then?

A. No.

Q. Now, where did you go after you -- when he asked you to show him the boxes, where did you go?

A. After I showed him where the boxes were.

Q. And where were the boxes, again?

A. At the basement stairs. They were packed at the bottom of the stairs in the -- at the back door.

Q. And, then, you went down there with him?

A. That's right.

Q. And what do you remember happening at the point you went down there with him?

A. He -- he -- wanted to take the boxes out and he picked up a box and gave it to John Hillier and --

Q. All right.

[11447]

At that point of time, did you know whether or not Conrad Black had permission to take those boxes?

A. No.

Q. You don't know one way or the other?

A. (Shaking head.)

Q. When he started -- you can't shake your head. You got to answer so the --

A. Sorry.

Q. -- Judge and the good-looking fella with the red hair can see you.

(Laughter.)

BY MR. GENSON:

Q. At the time, did you see them move the boxes out?

A. I saw them move some boxes out.

Q. All right.

How long -- did you stay there at that point?

A. No.

Q. Where did you go?

A. I went back up to my office.

Q. Now, did there come a time when you saw Mr. Black, again, that day?

A. He came -- he came -- back in to the office.

Q. All right.

Had you seen where he put the boxes or where they put the boxes?

[11448]

A. No.

Q. To your knowledge, did they put them back in your car?

A. No.

Q. And did you see the boxes after that, again?

A. No, I did not.

Q. Now, were there any security cameras in or around the building?

A. Yes.

Q. And how long had they been there, to your knowledge?

A. Since I was -- since I first worked there, there were security cameras.

Q. Were there -- and the little ante-way before you go out, did you know there was a security camera there?

A. Yes, I did.

Q. In the -- did you know that there was a security camera relative to the parking lot? Did you know that?

A. Yes, I did.

Q. Were you aware -- or were you aware one way or the other where any new -- whether any new cameras were installed at or about that time?

A. No.

Q. And with regard to the cameras that had been there the whole time you were there, do you know -- did you believe and do you believe that they were working that whole time?

A. Yes.

* * * * *

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 7, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME FIFTY-TWO
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Direct Examination of Patrick Ryan

[12611]

Q. Okay.

Well, we'll get there.

Whatever you told them about what you had been told of approval, you told the Audit Committee that you were [12612] looking to them for approval of these $15 million payments at that meeting; isn't that correct?

A. We were looking for there -- to make sure they were comfortable with the disclosures on all of the non-compete items.

Q. You told the Audit Committee that you were looking to them for approval at that meeting; isn't that correct?

A. That's correct.

Q. You directed -- okay.

Now, back to that -- what you directed their attention to.

You directed the Audit Committee's attention to the disclosure that we looked at; that is, Subparagraph F on Page F-16 of JB 1118, right?

A. That's correct.

Q. And you told them that the U.S. Community newspaper non-compete payments, $15 million, had not been disclosed before, correct?

A. That's correct.

Q. You told them that they were all disclosed in the draft financial statements that they were looking at during that meeting, right?

A. In fact, I drew their attention to this note.

Q. Yes, you drew their attention to that very note, right?

A. That's correct.

[12613]

Q. To the language that had been drafted, right?

A. That's correct.

Q. And Governor Thompson was sitting in the same room as you, wasn't he?

A. Yes, he was.

Q. You were telling them that what was in the note to the draft disclosure about the non-compete payments, right?

You were drawing their attention to it, correct?

A. That's correct.

Q. And you told them that you were looking for them to approve this?

A. To confirm their approval.

Q. Okay.

Well, earlier, you said that you were looking for them to -- I'm not sure that -- is there a difference in your mind, by the way, to confirm approval or approve?

A. Well, our evidence was that the particular transaction had been -- appeared to have been approved, but the amount of the non-competes had not -- did not appear to have been approved.

Q. Well, okay. Right.

So, you're looking for them to say, "These are approved," correct, or not?

A. Exactly.

Q. And during that meeting, the Audit Committee made it clear to you that those U.S. Community newspapers were approved?

[12614]

A. The Audit Committee didn't explicitly approve those payments. What they did do is they approved the financial statements with all these disclosures in them at the end of the meeting.

Q. And, to you, that meant that they had approved these non-compete payments, correct?

A. They had approved the disclosure of these non-compete payments, that's correct.

Q. And the -- no.

No, no, that's not the question.

The question is, sir: You understood that, based on what happened at that meeting, the Audit Committee approved the non-compete payments, correct?

A. Correct

* * * * *

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 8, 2007
Defendants.	)	8:45 o'clock a.m.

VOLUME FIFTY-THREE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE

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Direct Examination of Chris Paci

[12826]

Q. Oh, that's right, you did say that.

Now, I want to focus your attention on the second question on your list, which is, "With respect to the transactions set out in the table below, please

confirm that the disclosure in Hollinger International's Form 10-K and proxy statement for 2001 concerning these transactions and the approval by the committee thereof is correct."

[12827] Did you ask that question or a question similar to that during the meeting, during the call?

A. I believe that I did.

Q. And do you recall if you received any response to that question?

A. I recall that I did get a response.

Q. First of all, who gave you that response? Who said --

A. I recall that it was Governor Thompson.

Q. And what did Governor Thompson say in response to your Question No. 2, regarding the transactions listed in the table below?

A. I recall that he said that, yes, the transactions – that the related-party transactions had been approved by the Audit Committee and that the disclosure was correct.

* * * * *

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 18, 2007
Defendants.	)	8:45 o'clock a.m.

VOLUME FIFTY EIGHT
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

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Excerpts from Government Summation

[13631]

OPENING ARGUMENT ON BEHALF OF THE PLAINTIFF

BY MS. RUDER:

Ladies and gentlemen, we are not here because somebody made a mistake. We are not here because somebody forgot to dot their i's or cross their t's. We're not here because somebody was late on a disclosure or because somebody forgot to identify something as a related-party transaction. **[13632]** We are here because five men -- these four defendants (indicating), together with David Radler – systematically stole over $60 million from the shareholders of Hollinger International; and, because these same five men checked their fiduciary duty to the shareholders of the company at the doorstep.

Did they try and cover their tracks? You bet they did.

Did they try and leave behind a phoney paper trail that would make their actions appear legitimate, a cover story? That is exactly what they've done.

Ladies and gentlemen, it is time, and it will be your job, to expose this cover story for the lie that it is.

These men had a duty. They had a duty to be honest. They had a duty to be fair and loyal to the shareholders of Hollinger International. That means something. It means something, ladies and gentlemen. But the evidence has shown in this case that it did not mean anything to these defendants. Their duty was to each other. Their loyalty was to each other. Their loyalty was to the scheme.

Conrad Black fancied himself a proprietor. He could have a 747 if he wanted. No sackcloth and ashes for Conrad Black. It was his company and he could do with the company and its money as he pleased.

David Radler, Peter Atkinson, Jack Boultbee and Mark [13633] Kipnis, they were part of his team. They went along with Mr. Black's approach to the company because it benefitted them, because it enriched them.

And because the top four executives could not take all the money that they wanted from the company openly and honestly, they lied about it. They lied to the shareholders about the true reasons why over $60 million went not to the shareholders, but instead to the top four executives and to the company that Mr. Black controlled -- Hollinger, Inc.

They stole money and property from Hollinger International. They robbed the shareholders of their right to honest services, to honest executives who were focused on doing their job loyally for the company. That is fraud.

Now, there are a lot of legal terms that define these men's crimes, but what it boils down to is really quite simple: Conrad Black, David Radler, Jack Boultbee and Peter Atkinson decided on their own to take a slice of the company's profits -- the profits that they were making on these U.S. and Canadian newspaper deals -- and, with Mark Kipnis' help, they created a phoney paper trail to make their actions appear legitimate.

There is a great divide in this criminal case. On one side of this great divide, you have the defendants and Mr. Radler. They knew the truth. They knew the truth about why these payments were really being made. [13634]

Everybody else in the case from the Audit Committee to the auditors at KPMG to the lawyers at Torys, the lawyers at Cravath, the inside

accountants, other people at the company and, most importantly, to the shareholders of Hollinger International, they were on the other side of the great divide. They did not know the truth. They did not know the facts about why these payments were being made.

Now, sure, some of the people knew that money had been paid to Inc. And some of the people knew eventually that money had been paid to the top executives. But, ladies and gentlemen, they didn't know the real reason why. And that is the heart of this case. That is what this case is about.

It's not about the fact that money was paid. On its own, that wasn't the fraud. Where you see the fraud and where the crime is that we're going to be talking about today is the way that defendants hid and lied and concealed the true reasons why. And what I mean by that, it all has to do, it all comes back to the buyer's request. That is the single most critical, most important fact -- most important fact -- in this fraud scheme.

The reason why the buyer's request is so critical here is because unless the buyer requested it; unless the buyer required it; unless the buyer absolutely, positively would not do the deal unless a non-compete was entered into and unless money was paid, then there is no reason -- there's [13635] no justification -- for taking that money away from the shareholders and giving it instead to Hollinger, Inc., and to the executives. No reason at all.

It's the buyer's demand that is the only justification for why this money doesn't go to the company -- as it was initially supposed to -- but instead goes somewhere else. It's the most important thing.

Now, months ago -- about three months -- ago the lawyers in this case presenting opening statements to you -- and this is one of the slides that Mr. Cramer used in his presentation.

What Mr. Cramer told you, on behalf of the government, is that you would hear evidence in this case that the defendants made statements to the shareholders and to others about these non-compete payments to Inc. and to the executives. And what the defendants told people, what they told the shareholders, was that these non-compete payments were made because they were requested by the buyers; because they were critical conditions of closing; that they had been approved by the company's independent directors; and, that they were made in connection with newspaper sales.

Mr. Cramer told you the evidence would show that those statements defendants had made were false, these non-competes had not been requested by the buyers; that they, in fact, were not critical conditions of closing. The buyers [13636] would have closed, anyway. The buyers didn't care.

He told you the government would prove that the independent directors had not approved the terms of these payments and that, on top of that, you would see evidence that some of these payments were not even made in connection with newspaper sales.

We have proved all of that to you beyond any reasonable doubt. That has been the evidence in this case.

Now, here's what I intend to cover today. This has been a very long trial. It is utterly impossible for me to cover everything, to go back over

all the documents, all the testimony. I'm not even going to try because we'd be here for three more months.

There are four crimes that are charged in this case: Mail and wire fraud, tax fraud, racketeering, and obstruction. The last two are against Mr. Black alone. The first two are against all four defendants. And we are going to talk through all of those.

The very, very large bulk of what I'm going to talk to you about today is the mail and wire fraud because that really covers most everything in the case. The obstruction has a different set of facts, and we'll cover that at the end. But the very large bulk of my remarks today is going to be on the mail and wire fraud schemes.

What I'm going to do here is cover all the [13637] non-compete stuff first, both the U.S. and the CanWest non-compete schemes. And, then, we're going to take a step back and I'm going to talk to you separately about each one of the four defendants -- Mr. Black, Mr. Boultbee, Mr. Atkinson and Mr. Kipnis -- to re-emphasize for you the government's proof that each one of these men knowingly, intentionally participated in this fraud scheme; that each one of the four of them is guilty beyond a reasonable doubt of this fraud that we have alleged and we have proved.

And, then, we will come back and pick up the perks, which is one of the fraud schemes, and we'll cover the racketeering and the obstruction.

Now, I am not going to spend much time today on the law. Judge St. Eve, at the very end of all the lawyers' arguments, she will give you a very

detailed set of jury instructions. From time to time, I will show you either a summary or the actual part of one of the instructions that I expect the Judge will give you. But I do not intend, and it's not my job, to go through all of the law with you.

It's also -- excuse me.

(Brief pause.)

BY MS. RUDER:

It's also, as I said, not possible for me to cover all of the facts. But you members of this jury have been extraordinarily attentive over the past few months. We've **[13638]** seen you take notes. We've seen you paying attention. And you already have -- before I say anything more, you already have -- the tools that you need, along with the Judge's instructions, which you'll get, because you know this case and you have your common sense. What I want to do is highlight for you -- I want to emphasize -- certain points that we think will be useful to you in your deliberations.

So, we're going to start with mail and wire fraud. These are not the detailed instructions that you're going to get, but this is just a summary.

But there are three parts of it. First, we have to show you that there was, in fact, a scheme -- a scheme to defraud. In this case, there were three: The U.S. non-compete scheme, the CanWest scheme, and the perks scheme.

We also have to show that this wasn't all a big mistake; these defendants did this knowingly; they had intent to defraud the company.

And we also have to show -- because this is mail and wire fraud, we have to show -- that the

mails and wires were used as part of this. Wires are things like e-mails, faxes, and so on. So, we will cover this.

One thing I want to mention, though, before I get started with the scheme, part of the intent to defraud that we're talking about in this case is very common sense. The defendants stole money and property from the company. That's [13639] one of the theories behind this fraud.

There's also a second theory, and we are alleging both. The second theory has to do with something called honest services. And I expect the Judge will instruct you that a corporation's officers -- which includes all four of these defendants -- as well as its directors and controlling shareholders -- which also includes Mr. Black -- owe a fiduciary duty of loyalty to the corporation and its public shareholders.

What does that mean? The duty of loyalty requires that the directors, officers and controlling shareholders act in the corporation's best interest; that they refrain from taking actions that either conflict with the corporation's interests or that harm the corporation. And I mention this to you right at the outset because it is a common thread that runs through what we're going to be talking about today.

Stealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious; and, it's part of the fraud that is alleged in this case.

* * * * *

[13699]

And, ladies and gentlemen, I told you at the beginning that this is partly about the theft of money. And it is, because this is stealing 9-and-a-half million bucks. But there's the other part of it, too. That loyalty, that honest services that all five of these men owed to the company. Mr. Black owed it, Mr. Radler, Mr. Boultbee, Mr. Atkinson, and Mr. Kipnis. Every single one of them.

In this deal, they robbed the shareholders of that, too. Because Conrad Black and David Radler and Jack Boultbee and Peter Atkinson, they have an obligation to protect the company's money, to protect the assets. If the buyer wasn't requiring it, they had a duty to make sure that that money went to the shareholders.

Mark Kipnis had the same duty. And he knows as well as anyone -- he is on the front lines talking to Mr. Reed and Mr. Henson. He knows they're not requiring this. He knows they're not requesting it. He knows $9-and-a-half million is nowhere in the contract. What is he doing when he takes out his pen and gets that money to the top four executives? That is a violation of his duty of loyalty. It is not honest services.

All of these defendants stole that. They stole the money and they stole the trust, the loyalty that these [13700] shareholders had every right to expect.

* * * * *

[13705]

And why would they? They're not finished. This is when we get to APC. It's not a deal. There's no conditions of closing to worry about. There's nothing that I can tell you about whether the buyer

requested anything, because it wasn't a sale of newspapers. This was, Mr. Cramer told you in opening statements, just a money grab. And that's right. It was just a money grab.

Here's what APC is about, ladies and gentlemen. David Radler, Conrad Black, Jack Boultbee and Peter Atkinson, they wanted some more money -- more of the company's money. And, so, they took it. And they had Mark Kipnis dummy-up **[13706]** these non-compete contracts; sign them up with the company's own subsidiary, so that they could get the payments tax-free. They would have a paper trail so that they could take the payments tax-free. That's APC.

* * * * *

[13709]

Now we're coming to the end of the thefts: April, 2001. It's hard to know which one is more blatant, frankly: This one (indicating) that we're about to talk about in Forum and Paxton, or the APC that we just looked at.

[13710] In April of 2001, we come back to the Forum and Paxton case. And, remember, when we talked about Forum and talked about Mr. Case, he told you will very specifically he did not request or require non-competes either from Hollinger, Inc., or from any of the executives.

And, as a matter of fact, the only non-compete that Mr. Case signed is with International and Inc. There were no Non-Compete Agreements with any of the top four executives in Forum. And there weren't in Paxton, either. There were no non-competes with the individual executives. Nothing was signed.

As it turns out, that's because Mr. Kipnis messed up.

David Radler testified and explained to you that he had spoken with Mr. Kipnis about this before; and, just as in CNHI II, the plan was for Mr. Black, Mr. Radler, Mr. Boultbee and Mr. Atkinson to be added to all the deals and for money to be set aside for them in all the deals.

But Mr. Kipnis told Mr. Radler that he forgot.

Well, Conrad Black called Mr. Radler and said, "Where's the money? We were supposed to get money in Forum and Paxton, too."

Here's what Mr. Radler told Mr. Black. Mr. Radler did some checking and he found out there was only $600,000 left in the Forum and Paxton reserves. That was the money that had been set aside for other things in order to finish [13711] the deal.

No money had been set aside for non-competes because there weren't any with the individuals.

Does that stop Mr. Black? No. This is not a rules guy, ladies and gentlemen. They decide to take the money, anyway. They divvy it up -- Mr. Black and Mr. Radler – to themselves and to Mr. Boultbee and Mr. Atkinson.

And, again, remember, why does Conrad Black care about cutting in Jack Boultbee and Peter Atkinson? It's because it saves him on having to pay them bonuses out of Ravelston. He's stingy with his own money, but he's very generous with Hollinger International's money; very generous with the money of the shareholders.

Then this memo (indicating) is created: April 6th, 2001. Roland McBride, again, the guy who is handling the checks and the payments down in Marion, writes a memo to Lisa Morse, who was also what I'll call a money mover. It says, "Please issue supplemental non-competition payments to the following individuals." Then it lists the four of them. "This is to be charged against the remaining sales reserves for Paxton and Jamestown. cc: David Radler, Mark Kipnis."

What? Supplemental non-competition payments? Why? There were no Non-Competition Agreements. Take it out of Paxton and Jamestown or the Forum transaction? Why are they doing that? There is no reason. This money is sitting right [13712] now -- as of April 6th, 2001, it is sitting -- in the bank account at Hollinger International with APC. It's one of its subsidiaries.

They're saying, "We're going to take it. We're just going to take it as supplemental non-compete payments even though we didn't sign documents. cc: David Radler and Mark Kipnis."

Mark Kipnis was the lawyer on both of those deals for Hollinger International. He knows that there were no non-competes signed. It's not just that David Radler told you. You know it from the documents. You know it from the other proof that corroborates Mr. Radler.

We can look through these binders all day long. You're not going to see a non-compete signed by Mr. Black, Radler, Boultbee and Atkinson in the Forum and Paxton transactions. They do not exist. Mark Kipnis was the lawyer on the deals. He knows that.

Where is Mark Kipnis' duty of loyalty when he gets this memo?

MR. SAFER: Objection, your Honor. There is no evidence he got that memo. None.

THE COURT: Ms. Ruder?

MS. RUDER: He's copied on the memo, Judge.

MR. SAFER: And that's it.

THE COURT: Ladies and gentlemen, again, what you are [13713] hearing now are arguments of the attorneys in the case. Your recollection of the evidence is what does control and will continue to control.

You may proceed.

BY MS. RUDER:

Perhaps Mr. Safer will argue to you that Mr. Kipnis never got this memo.

I don't know, ladies and gentlemen. He's copied on it right here (indicating). And Mr. Kipnis certainly knows about this $600,000 because as we're going to see in just a few minutes, we get to the disclosure of the money – the $600,000 -- where Mr. Kipnis, along with the other defendants, lies about what this money is. So, we will come to that.

But, yes, Mark Kipnis is on here (indicating). And the question that I posed was, "Yes, where is his duty of loyalty to the shareholders of Hollinger International?"

He and Mr. Radler and the other guys who are getting this money. They have an obligation to protect. They have an obligation to be fair to the

company and the shareholders. They're taking the money and they're taking it for no reason.

There was no reason. There were no individual Non-Compete Agreements in Forum and Paxton. It's stealing, plain and simple.

April, 2001, all the money's been taken. Every penny, every dollar that we're talking about in this case, by [13714] the time we get to April, 2001, it's out of Hollinger International and it's with the top four executives and Hollinger, Inc., the company controlled by Mr. Black. All of the money has been taken.

Do you know, what? They almost got away with it. They almost did. Because by this time, April of 2001, none of this money -- none of these payments -- had been disclosed to the shareholders. The shareholders didn't know a thing. None of it. Not CanWest, not the U.S. Community deals, not this APC money, not this bogus 600,000 bucks. None of it had been told to the shareholders.

* * * * *

[13726]

That's not what this case is about. It's not about the fact that money was paid to Mr. Atkinson. It's not about the dollar amounts. It's about why. Why was that money paid to Peter Atkinson. It says here that it was a condition to the transaction. That's not true.

And, listen, if defense counsel wants to parse out that language and say, "Well, it was technically a condition to the transaction because there was in the contract on page whatever a little subsection that says, 'Conditions of Closing.'"

And do you see Peter Atkinson's name right there (indicating)? Well, that's part of the cover story, too, ladies and gentlemen. That's the paper trail that they left behind to be able to argue something like this.

Because the truth of it is CanWest did require it to close the deal. And that's what matters. It's not whether you can construct an argument later based on a contract. They had a duty of loyalty to refrain from doing things that would harm the shareholders' interests.

And because they had that duty of loyalty, this (indicating) doesn't fly, ladies and gentlemen. It does not fly. You can't make up an after-the-fact argument using lawyer terms like "condition of closing" and point to some paragraph and say, "well, see, it says right here, 'Condition [13727] of Closing.'"

MR. SCHACHTER: Your Honor, objection. This is getting into legal conclusions. There is -- the law is -- Ms. Ruder is misstating the law. To suggest that the duty of loyalty requires anything in particular about this disclosure, that's incorrect.

THE COURT: Ladies and gentlemen, I will instruct you on the law that applies to this case after we have heard all of the closing arguments.

The Court's instructions on the law are mandatory for you to follow. So, you will hear the law from the Court at the end of the closings.

You may proceed.

BY MS. RUDER:

Yes.

And I do expect, ladies and gentlemen, the Judge will give you a specific instruction on what the duty of loyalty requires. And I am confident, when you hear that instruction, which does require Mr. Atkinson, along with the others, to refrain from taking actions that harm the shareholders' interests. That was part of this. Because Mr. Atkinson, just like the others, he had a duty to tell the truth. Not to parse words, but to tell the truth about what this payment was for.

MR. SCHACHTER: Your Honor, objection. Instructions **[13278]** about duty of loyalty should come from the Court, not from Ms. Ruder. Ms. Ruder is misstating the law.

THE COURT: Ladies and gentlemen, when I instruct you on the law at the end of the case, I will instruct you about the duty of loyalty. And that is the law that you must follow.

BY MS. RUDER:

The crime in this case is not about the fact that defendants got money. It's not that by itself. The crime in this case is that the defendants hid and lied about the true reasons why they got money.

The SEC disclosures in this case, that's why they're relevant. It's because when you look at those disclosures, you see the defendants hiding from the shareholders, lying to the shareholders about the true reasons why this money was getting paid to them -- getting paid to the top four executives -- instead of staying with the company. This is what it's about, ladies and gentlemen.

The same thing happens in the U.S. Community disclosures. Feet to the fire. Disclosures made. It says, "In connection with the sales of

United States newspaper properties." It says, "To satisfy a closing condition." It says there were non-competes. It's not true.

The particular dollar amount that we're talking about here is $15.6 million. Where does that come from?

[13729] This is what it comes from (indicating). And you've heard the witnesses testify about this: Nine-and-a-half million was for the CNHI II transaction; five-and-a-half for APC; and, 600,000 for Forum and Paxton.

9.5 million for the executives in CNHI II was not a condition of closing. There's not even a contract they can point to to say that. Because nine-and-a-half million isn't anywhere. That's false.

APC, that's not a newspaper transaction. There are no conditions of closing. There are no Non-Compete Agreements with buyers. That's false, too.

And let me pause on the 5.5 for a second because you have heard some testimony in this case and heard suggestions by counsel that what this $5.5 million was really about was unpaid management fees from Hollinger International to the executives at Ravelston.

And you heard absolutely, as a matter of fact, from Fred Creasey that that's not what it was. It was not – the 5.5 was not -- part of management fees.

But the reason I'm bringing it up now is even if any of these defendants truly believed this was part of management fees, then what are they doing lying about it when you get these disclosures?

They say it's part of newspaper transactions, condition of closing, all this nonsense. If they really believed this was legitimate [13730] money – legitimate money that they received for legitimate purposes – there wouldn't be a reason to lie to the shareholders of the company about what it was really about.

And that's just what happened.

Forum and Paxton, again, it's easy. The disclosure says that these guys signed non-competes with the buyers. They didn't. That didn't happen here. This wasn't part of condition of closing those transactions.

So, the disclosure is completely false.

The disclosure is also false because it says, "The independent directors approved the terms of the payments." That's not true, either. The independent directors – in particular, the Audit Committee -- wasn't told anything about the terms of the CNHI II, APC and Forum and Paxton payments. They testified -- all three of them: Mr. Burt, Ms. Kravis and Governor Thompson -- unequivocally, unequivocally, that they did not know about these payments and they didn't approve them.

And they are corroborated on the documents..

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[13743]

We also have to show intent to defraud. These things were done knowingly with the intent to deceive and cheat Hollinger International and its public shareholders.

And there are two parts of this. First, it's that theft of money and property causing a gain of money or property to the defendants or others, or the potential loss of money or property to another, or depriving the corporation of and its public shareholders of their right of the honest services of the corporate officers.

Intent to defraud can be either one or it can be both.

We are pursuing both theories, ladies and gentlemen. Both of them in this case.

With that, let's talk about Conrad Black.

* * * * *

[13768]

David Radler got caught. He got caught in his lies. He pled guilty to the crime, the crime that he did. And he accepted responsibility and he came in and he testified to you about his role in these awful events.

It's not a flattering role, it's not an attractive role at all, but Mr. Radler came in and he told you about that. But, ladies and gentlemen, Mr. Radler didn't do this by himself. He didn't commit this crime alone. He did it with Mr. Black and with Mr. Boultbee and with Mr. Atkinson and with Mr. Kipnis.

It's not just David Radler's word, it's all the evidence, ladies and gentlemen. It's all of it together.

Now, because we're talking right now about knowledge and intent, we need to consider what evidence there has been in this case about Mr. Black's approach to the shareholders of the company

because part of the crime is stealing the money, taking money and property from the corporation; but the other part of it is these honest services that we talked about, the duty of loyalty to the shareholders of the corporation.

And in the evidence that's been entered into in this case, the evidence you've seen in the case, there are plenty of things for you to look at to get a window into Mr. Black's mind and his heart when it comes to his duty of loyalty to the shareholders.

* * * * *

[13872]

A similar memo comes May 13, 2005. The rules are still in place. You can't just take this stuff. You've got to go through an inspector.

Now, Mr. Black's counsel has argued to you that, look, all of Mr. Black's documents had already been copied, had already been copied by his lawyers. They had big staffs of people from his law firms going in and copying everything at 10 Toronto Street. However, ladies and gentlemen, that doesn't matter.

Let me move forward to -- let me move forward to Government Exhibit Toronto 18. On May 19, 2005, Mr. Black's counsel, Ms. Owens at Baker Botts, receives this notice from the SEC. This time they want more documents. They're asking Mr. Black for more information.

Now, did Ms. Owens immediately pick up the phone and call Conrad Black? She testified in this case. She told you she didn't, and there's no reason not to credit Ms. Owens's testimony.

But Ms. Owens was far from Conrad Black's only lawyer. He had lots of them, ladies and

gentlemen, and it defies reason to believe that the SEC is knocking on Mr. Black's door. He's got this specialized army of SEC and criminal lawyers, and nobody told him that the SEC was coming back for more?

[13873]

Use your common sense. But even if, even if somehow this information did not make its way to Conrad Black, it doesn't matter because he still knows that this SEC proceeding is ongoing. He still knows that he's facing criminal charges. Remember, everybody knows that.

And that's when we get to May 20th, 2005. And on that day, we see something truly startling because Conrad Black, knowing that all this is going on, he enters 10 Toronto Street and with the help of his assistant, Ms. Maida, and his chauffeur, he removes 13 boxes of documents. He removes them from the building.

Now, you heard the testimony. Ms. Maida had already tried to get those boxes out earlier in the day, and she had been stopped. She was prevented from taking them out. The inspector said no.

This isn't eviction day either. This isn't May 31st. There's still 11 days left. And once the inspectors say no and the documents are required to stay put within 10 Toronto Street, you'd think there would be no rush. There's 11 more days. Let the inspectors come back on Tuesday after the holiday and take a look.

But that's not what happens. Ms. Maida tells Mr. Black what's happened, and he is irritated. He comes down, and he takes the boxes. And what is it that Mr. Black is doing?

* * * * *

[13879]

Okay. This -- this brings us full circle, and what I've described to you today is the case that you've heard for three months. For the rest of this week, you're going to hear from defense counsel, counsel for each of the defendants in this case. Ladies and gentlemen, keep your eye on the ball.

Keep your eye on the crime -- no, I need that, thank you -- keep your eye on the crime. The crime here is the defendants' lies to the shareholders about why over $60 million went to Inc. and to the top four executives and not to the company. Okay. The crime here -- I blame Mr. Sussman -- the crime in this case is about why. This is what I have been talking to you about all day.

Why did the shareholders receive $60 million less than they were supposed to? In the CNHI II transaction, what about that nine-and-a-half-million dollars? What possible basis was there for that to go to Mr. Black, Radler, Boultbee and Atkinson? The buyer didn't require it, ladies and gentlemen. There's no legitimate reason.

When they're asked about it, they lie about it. And the same pattern, the same thing is true on all these other [13880] transactions. It's about stealing money, ladies and gentlemen. And this, this honest services, acting in the corporation's best interests, refraining from taking actions that either conflict with the corporation's interests or that harm the corporation, that meant nothing to them. Nothing.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	June 26, 2007
Defendants.	)	9:00 o'clock a.m.

VOLUME SIXTY-THREE
TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

* * * * * * * * * * * * * * * * * * * *

Excerpts from Government Summation

[14903]

FINAL ARGUMENT ON BEHALF OF THE PLAINTIFF

BY MR. SUSSMAN:

Now, I can't possibly address all the points that have been raised in the past -- it's been a little over a week. I'm not going to be able to do it all this afternoon.

But I want to spend some time with you talking about the key issues in the case and correcting some of what the government believes are the more glaring errors in some of the defense arguments.

Again, not all of them, but I want to address some of them because -- and I want to address what the government [14904] believes are the most important ones.

It's been almost four months. We've had a little over 40 witnesses and thousands of documents. But, you know, there's a moment of truth in this story for every defendant.

A moment of truth where you know that that defendant participated in the scheme and did it knowingly and with the intent to defraud.

For Mr. Black. For Mr. Black, that moment was paying himself not to compete with himself in Horizon and APC.

Now, what did we hear from Mr. Black's defense?

Well, at first we heard the shareholders asking questions about the non-competes and we hear Mr. Black saying something -- something -- about EBITDA.

Then, in opening, you heard that the company was stolen from him. And, by closing argument, Mr. Black was simply David Radler's dupe.

Mr. Boultbee. What was the defining moment for Mr. Boultbee, the moment of truth? Well, probably it's when he receives a check for $450,000 in the CNHI II non-compete. You remember that deal. The one where he didn't know

the buyers and they didn't know him from Adam's house cat, I , was the word Mr. Henson used.

How did Mr. Boultbee's lawyers respond to you about this moment of truth? Well, rather than deal with the evidence, they argued that, "Well, hey, it's an enforceable **[14905]** Non-Compete Agreement and Mike Reed and Tom Henson, they lied to you about not wanting Jack Boultbee as part of that deal. They got up and lied to you."

Mr. Atkinson. What's Mr. Atkinson's moment of truth? Well, when he decides to insert himself in the CanWest transaction because he believed that he deserved a tax-free bonus for all his hard work on that transaction, even though he knew that CanWest only wanted David Radler and Conrad Black's non-compete.

Now, in his opening statement, Mr. Atkinson's lawyer told you that the CanWest non-competes were really a bonus from Conrad Black and David Radler, and that everyone knew about it. Now, while you still hear that it's a bonus in closing argument, you are told from a different lawyer for Mr. Atkinson, that, well, at the same time that Mr. Black decided to award a bonus to Mr. Atkinson, you'll never believe it, but CanWest coincidentally wanted his non-compete on that very same day.

For Mr. Kipnis. Well, for Mr. Kipnis the moment of truth is really that moment when he first tried to get Tom Henson to wire the millions directly to the International executives, only to be rebuffed.

He tried, again. This time to have Henson write their names on the transfer memo and the amounts of the wire transfer. Again, Mr. Henson

refused. Finally, Mr. Kipnis [14906] gave in and he handwrote the names and amounts himself.

Why? All in an effort to get $9.5 million to Hollinger executives, despite knowing that the non-compete provision in the Asset Purchase Agreement, which he had helped work on, was only for $3 million and that money was only supposed to go to the company; and -- I just heard from counsel -- also, despite knowing that those payments, in addition to the APC payments, were just silly.

Mr. Kipnis' lawyer told you in his opening statement that Mr. Kipnis was either an innocent bystander to a fraud who just happened to be there or that he was wielding his anti-fraud pen. Now, four months later, it's all Tom Henson's fault.

For all of them, for each of these defendants, the moment of truth comes together when they either lie to the Audit Committee or they lie to the Board or they lie to the shareholders; or, for some, while they ignore their duties and sit silently by while these groups ask questions or were lied to by others or approved transactions under false pretenses.

But what you've really heard for the last week or so, in each and every one of the defense closings, is that the government has failed to prove something that wasn't charged.

For example, how many times did we hear that the government failed to prove that these are invalid non-competes? Now, that might be relevant to a case that [14907] charge that these men defrauded the buyers of real non-competes, but it doesn't come close to answering the question that Ms. Ruder posed to you. The question of why. Why

were these men getting paid for non-competes that the buyers never required or requested. Why? Why were these men getting that money?

And it's the same with all the time that's been spent on whether there was evidence that these related-party transactions could be or couldn't be identified by KPMG. That, too, misses the mark. The defendants are not charged with hiding the fact that something was a related-party transaction. They're not charged with that. That's not the crime.

They are charged with lying about why they got paid for non-competes that the buyers didn't ask for and were not required to close the transaction. Why?

Every moment these defendants have spent defending against the things they're not charged with tells you a little something. It tells you how much that they don't want ton spend time dealing with the crimes that their clients are charged with.

Simply put, over the last week or so, we've heard from six different defense lawyers who have talked to you for well over 25 hours and not a single one of them dead on addressed the question that you need to decide: Why were **[14908]** these men entitled to take money and lie to the Audit Committee, the Board of Directors and the shareholders about it? Why were they entitled to take this money and lie about it?

* * * * *

[14941]

MR. SUSSMAN: Who profits from this transaction?

The APC transaction. Again, this is one of the few transactions where David Radler and Conrad Black profit on really, truly on an equal playing field, and still Mr. Boultbee and Mr. Atkinson are thrown in.

Here's the totals, okay? In this scheme, look at the totals. David Radler makes a hefty or profits a hefty 8,840,000. Not bad. But what does Conrad Black pull in from this? 14 million --

MR. GENSON: Objection, again, he didn't pull in anything. There's no distributions of Inc.

MR. SUSSMAN: Let me restate it.

THE COURT: Restate it. Sustained.

MR. SUSSMAN: What does Conrad Black -- what does Conrad Black profit from this fraud total? $14,798,000 with an extra 1.9 million each going to Mr. Atkinson and Mr. Boultbee, and that is money in their pockets. Incidentally, tax free.

* * * * *

[14947]

And Conrad Black knows this, too, and that's why what he tells the board and the Audit Committee in the May 2001 memo and the shareholders at the shareholders meetings are lies. But why is this fraud they ask you? It's a fair question. They say, well, why is it fraud?

Well, the answer, of course, is it's Hollinger International's money. It's the shareholders' money, and it's a violation of honest services. Ms. Ruder told you that two of the key points or what I would call two of the key points, but you'll have the judge's instructions, are that these individuals act in the

corporation's best interests, that they not do something that conflicts with the corporation's interests or to harm the corporation.

[14948]

What do I mean by that? You know, you'll have the judge's instructions but let me give you my reading of it, but you follow the judge's. It means these men had a duty of loyal to act in the company's, the shareholders', best interests. I'm going to suggest to you -- there, I said it, we've all said I suggest to you -- I'm going to suggest to you that means putting the shareholders' interest number one, okay? Shareholders' interests number one.

Now, let's keep that in mind, this framework of honest services, and let's think back for a second to August of 2000. Remember what's going on. August of 2000 there is $80 million that has been carved out of the CanWest -- of the CanWest agreement that's going to go to non-competes, okay? There are at the time the transaction is signed in July of 2000, end of July of 2000, there are seven non-compete covenantors, seven different companies and individuals signing: Mr. Black, Mr. Boultbee, Mr. Atkinson, Mr. Radler, Ravelston, we have Hollinger International and Hollinger, Inc., okay?

Those are the parties that are signing this agreement, and there's $80 million Canadian in a pot that is to be split among or can be split among those individuals and those companies.

Also remember whose assets are these that are being sold? Hollinger **[14949]** International's assets, right? And Hollinger International is the company that owned all of the Canadian

newspapers. Hollinger International is certainly one of the companies that Mr. Asper and CanWest wanted to make sure signed that non-compete. They're in all of the original non-compete agreements that you saw well before Mr. Boultbee and Mr. Atkinson were added.

Okay. So we've got seven individuals – seven parties, and, essentially, you remember Mr. Atkinson's memo in August of 2000. It's from Mr. Atkinson to Mr. Black. And generally what's it talking about?

What it's talking about is, okay, how are we going to split up that $80 million among the covenantors, okay? The seven -- the companies versus the individuals, how are we going to split up that money?

Okay. Keep in mind what we talked about with honest services. These guys, shareholders' interests first. So there's a pot of money on the table. It's August of 2000. It's the moment of truth. If you have any, any question in your mind about how these guys viewed their fiduciary responsibilities to Hollinger International, please, please come back to this moment in August of 2000 and take a look at what they did behind closed doors. When the shareholders weren't watching, when no one was watching, take a look at what they did with this pot of $80 million.

Okay. 38 million, where does it go? To Ravelston. **[14950]** Conrad Black, David Radler, Peter Atkinson, Jack Boultbee's company, and there are other people who own it as well.

$19 million, Conrad Black. Another $19 million, David Radler. You know the drill. 2 million

to Peter Atkinson. 2 million to Jack Boultbee. How much? How much did these guys, who owe a fiduciary duty of loyalty, of honest services to the shareholders of Hollinger International, how much did these guys allocate of that Non-Competition Agreement to the company that they are working for, the company that they are selling the assets for?

* * * * *

[14952]

And you know what? Whether it's cheating the shareholders out of the full 80 million or just $4 million combined for Mr. Atkinson and Mr. Boultbee, or maybe just the $4 million that the board was originally told in September that Hollinger International was supposed to receive, it doesn't matter. It's still stealing, okay? It's still wrong. It's still a violation of their duties of loyalty to this company and the shareholders.

* * * * *

[14953]

Mr. Black had an obligation not only to act in the shareholders' best interests, but to refrain from actions that harmed them. That is why Mr. Black violated his duty of honest services to the shareholders in the CanWest transaction [14954] just like every other deal in the U.S. Community non-competes.

* * * * *

[14972]

At what point does it become okay to steal from the company, ladies and gentlemen? Here? How about -- how about up here? If the company's

making a lot of money, which of those places is it okay to steal from the company?

Okay. So here's what an honest officer and director does when the company's share prices are doing really well and they feel like they deserve a bonus. What they do is they go to the board of directors or they go to the Audit Committee or they go to the Compensation Committee and they show them that chart. And they say, you know what? I've done great things for this company, and I believe that I deserve a raise. And **[14973]** if the board of directors and the Audit Committee or whatever course they take approves it, then it gets disclosed in the proxy circular, if they're one of the top five executives at least, and the shareholders get a chance to see it.

And once the shareholders get a chance to see it, if the shareholders don't like it, they can raise questions about that pay at the shareholder meeting, and they can say Mr. Executive, why did you give yourself that humongous bonus of $1.9 million in 2000 and 2001? Why did you do that? And then they can tell the shareholders the truth, that they believed they deserved a bonus for all that they have done for the company and the great deals that they have done for the company.

You know, that's what an honest business person does. That's what an honest member, an officer, a director of a public company does. But that's not what happened in this case. When these men were questioned about the money they took, they didn't seek approval. They just lied to the shareholders.

* * * * *

[15007]

There's nothing wrong with legitimate tax planning. There is nothing wrong, ladies and gentlemen, we agree, and if there's -- if non-competes are entered into and they're taxable in Canada or not taxable in Canada, it doesn't matter a wit to this case.

* * * * *

[15016]

It doesn't make sense and it is fraud if these men on their own, without talking to the board of directors, without advising the shareholders, decide they're going to move $12 million up to Hollinger, Inc. Why? Because they want to. That's the only reason. Because it benefits Mr. Black's **[15017]** control of Hollinger, Inc.

If that's the only reason they're doing it and the contracts say otherwise, that is a lie. It's fraud. That's the fraud in this case. That's why it's the why that's important.

Excuse me. That's why it's significant that Hollinger, Inc. did not -- was not required by the buyers and that there is no justification for that money going up to -- away from the shareholders of Hollinger, Inc. -- excuse me -- of Hollinger International and to the shareholders of Hollinger, Inc. That's the crime. That's the fraud, what's wrong with the non-competes.

* * * * *

[15019]

You know, not only did they know it -- well, so that's -- that's the fraud. That's the fallacy of this

whole Inc. non-compete thing. This is nothing more than a way to move money from one company to another. And don't let them tell you that, oh, well, it's just one -- it's all just one big happy family, one's a parent, one's a child. You know, they have -- each -- these officers have fiduciary responsibilities to each company, and there's -- you'll read your Honor's -- her Honor's instructions about the fiduciary obligation, but there is no exception there, well, if you're on another board, you can breach your fiduciary duties.

No. These are Hollinger International's assets that are being sold. They owe their duty to Hollinger International. So when I put on here honest services and duty of loyalty, that's what I'm talking about. That's the fraud in this case. The shareholders of Hollinger International are getting defrauded out of that $16.5 million because the buyers never wanted this stuff.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
v.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS.	)	Chicago, Illinois
	)	June 27, 2007
Defendants.	)	9:00 o'clock a.m.

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE
THE HONORABLE AMY J. ST. EVE, AND A JURY

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PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

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Excerpts from Government Summation

[15061]

We left off yesterday talking about Mr. Atkinson an his $2 million lottery ticket -- his $2 million tax-free bonus from CanWest. And Mr. Atkinson's counsel wants to tell you, "Well, he was open, he was honest about his receipt of this bonus money in the CanWest transaction."

But, ladies and gentlemen, you have heard the evidence and you know that Mr. Atkinson was not open and honest about the receipt of this money as bonus money.

He was not open and honest with the Audit Committee and Board of Directors; and, he most certainly was not open and honest with the shareholders.

* * * * *

[15071]

You know, are ladies and gentlemen, you'll read the Judge's instructions and you'll see that there is a scheme to deprive the shareholders of honest services of the executives. And you'll see what that means is to take money from the shareholders or the company, or to gain money from the shareholders of the company, by means of fraud and deception. Okay? You will see that in the jury instructions.

* * * * *

[15082]

Well, let's just take a look at the information they got in front of the shareholders. I won't read it to you, but let's just do -- let's see how would we have had to – how would these guys have had to make this disclosure (indicating) accurate? Is it just nit-picking? Let's look.

Well, we'd have to add in here (indicating) that in 2000 -- "Well, these weren't all in connection with the sale of newspapers in 2000 because -- and in the case of the APC payments -- the decision of Messrs. Black, Radler, Boultbee and Atkinson to pay themselves bonuses in the form of Non-Compete

Agreements," they would have to add that in there, right, because otherwise the shareholders are told, "This was a non-compete for APC in connection with the sale of a [15083] newspaper in 2000."

It wasn't a closing -- to satisfy a closing condition. It was that Messrs. Black, Radler, Boultbee and Atkinson inserted themselves into the agreement that were not required by the buyer.

I mean, that's the true and accurate disclosure here.

They entered into Non-Competition Agreements with the purchasers, although in Forum and Paxton agreements, there were no individual Non-Compete Agreements. $6.1 million was really the amount that was paid in 2001 with those APC checks, although the checks were back-dated to 2000. Let's be honest with the shareholders.

Now, the amount in 2000 is actually -- it goes down a little bit. It's 9.5 million.

Is that right? No.

And, then, it says the company's independent directors were never presented with and never approved.

* * * * *

[15084]

The pattern is set. They tell you, "None of us lied to anyone." Why? Because everyone single lie in this case you've seen has gotten passed around like a hot potato. Peter Atkinson didn't write the September, 2000, memo, it's Mark Kipnis' and David Radler's fault.

Well, Kipnis says he didn't -- Kipnis' lawyer says he didn't -- know, he relied on David Radler.

And Peter Atkinson didn't write the May memo, it's Beth DeMerchant's fault. She wrote the May memo. She provided all the information.

Conrad Black's counsel tells you the same thing.

Peter Atkinson wasn't talking at the shareholders' meeting, so he didn't lie, 0to make any misrepresentations to the shareholders.

You know, what? All of these men knew that the information that was being provided to the shareholders was a lie.

And you won't see "lie" defined in the jury instructions. You're going to have to use your common sense on that. You'll see "honest services."

* * * * *

[15086]

I want to address APC.

This is the question that Mr. Schachter asked you in a very loud voice -- I think in my ear or maybe right behind me; I don't know if there was a neon sign above my head for this part -- "But why didn't the government tell you that APC money was simply pre-approved management fees?

"He implied that we were trying to hide facts from you, and that they weren't convenient, and that's why we didn't tell you that." Because it wasn't. Because those were not the facts. The APC money was not pre-approved management fees; and, not a single one of these defendants has offered you

any evidence that they actually were pre-approved management fees.

MR. SCHACHTER: Your Honor, objection. Mr. Radler's testimony.

THE COURT: Overruled.

BY MR. SUSSMAN:

Look at the evidence here, ladies and gentlemen. **[15087]** Again, Mr. Radler -- they want to make Mr. Radler their case. Look at the evidence of what these payments were.

This is questioning by Mr. Atkinson's counsel on cross-examination:

"Now, did you have an understanding at some point, Mr. Creasey, that these payments -- the 5.5 million that are referenced in this memo -- were supposed to represent the payment of management fees that had been owed to Ravelston?

"No."

"In any event -- " again, by Mr. Atkinson's counsel -- "In any event, the 5.5 million was paid to executives in February of 2001, and no one charged it against the Management Fee Accrual Account; is that right?

"Well, that's correct."

Look at the checks. Did Conrad Black honestly believe that this was management fee coming from American Publishing Company directly to him?

You remember at the beginning, ladies and gentlemen, the way it works is Ravelston gets the money and Ravelston pays the executives. How

many times have we been told that? These guys are not employees of Ravelston.

But what's happening here? Hollinger International is paying them -- or a subsidiary of Hollinger International is paying them -- directly. Check to Mr. Radler from AP -- from American Publishing Management Services. To Peter [15088] Atkinson. To Jack Boultbee. Those are the CNHI II checks (indicating).

And I'm not sure why I have that in there, but apparently that's what I was looking for: APC checks. And you'll see they look exactly the same, although the numbers are a little higher.

Not for Mr. Black, but $2.6 million, roughly, to Mr. Black from American Publishing Management Services. 2.6 million to Mr. Radler. 137,500 to Mr. Atkinson. 13,500 to Mr. Boultbee.

Remember the context here, as well. They want to tell you, "Well, we thought these were Ravelston Management fees." The context -- and Ms. Ruder just gave me a note reminding me to say "the context" -- the context here, ladies and gentlemen -- and the reason now I remember why those other slides were up there, the context is there are a series of non-compete payments that are coming in to these individuals: The CNHI II checks and the Paxton and Forum checks. And, of course, we've already talked about the CanWest checks.

What they want you to believe is that sandwiched in the middle of all these non-compete payments that are coming from Hollinger International's sale proceeds, that they really believe that these APC checks were actually owed management fees. That's the context.

But Mr. Safer tells you in his closing, as well, it's [15089] just a little mistake. Another little mistake.

Well, you know, this other little mistake cost the Hollinger International shareholders $5.5 million.

And look at the audit trail. The question is raised: Why are these checks (indicating) back-dated?

Ladies and gentlemen, you see what's circled there (indicating) is the 5.5 million. And you can draw your own conclusions, but I'm going to suggest to you that the reasonable inference why that $5.5 million, where it says, "Payments to Executives," what that represents are the APC payments.

And the reason that they're back-dated is because the CNHI II sale happened in 2000. And they want to take that money out of the 2000 sales proceeds. That's why the checks are back-dated. That is where the money comes from: The CNHI II sales proceeds.

Management fees. Why do I have a chart of management fees? Remember, nothing illegal about the management fees. No one saying that. But you heard from Professor Li that all these bonus payments, they're tax-free.

Okay. If these guys really believed -- I mean, they're now -- we're now -- in 2001, right? They've already discovered the tax-free non-compete. Why wouldn't they take every single cent of their Ravelston Management fees in non-competes from Hollinger International if that's the [15090] scheme?

Why would you stop at 5.5 million? There's no cap. It's legitimate tax planning.

Why would you take any of the Ravelston money as regular payments management fees rather than bonuses -- tax-free bonuses? If that's all it was, why wouldn't you pay Fred Creasey in non-competes, right? He's a Canadian citizen. He gets paid by Ravelston. Why not just pay Fred Creasey in non-competes?

Because they knew that this money was not coming from Ravelston. And the added bonus of this money -- of paying out money of Hollinger International to the executives for Mr. Black -- is that money is not coming out of Ravelston. He is able to give -- like Peter Atkinson told Mr. Healy, Mr. Black is able to give -- Mr. Atkinson a tax-free bonus. And, better yet, it doesn't come out of his pocket. It doesn't come out of Ravelston.

Now, you also know -- well, Mr. Atkinson's counsel also makes a comment to you that the money Peter's receiving, he believes that this, like the APC payments, is coming from David Radler and Conrad Black and not a dime from Hollinger International.

Again, you know that's not true. There's nothing to support that. You know exactly where that 9.5 million came from that got sent around. That 9.5 million came directly from CNHI II.

[15091] Now, how do you know that these men knew this was not management fees or some -- they hadn't made some -- mistake?

Well, look what they told the shareholders. They tell the shareholders in the proxy statement about the 5.5 million, right? And they tell the

shareholders -- and this is -- we're now we're in 2002, when Mark Kipnis signs the 2002 proxy.

Does Mark Kipnis really believe this is management fees re-characterized as bonuses?

No. That's why Mark Kipnis signs the proxy that tells the Hollinger International shareholders, "This is $5.5 million in non-competes." Why lie to the shareholders? Why tell them anything at all about this 5.5 million if it's not coming from Hollinger International; if it's really coming from Hollinger -- excuse me, from Ravelston?

And once Mr. Kipnis realizes this little mistake, does he run back ever to reclaim the $5.5 million from the company when he signs the proxy and says, "Oh, well, it actually probably does come from Hollinger International," because he knows that. Does he run back and reclaim that $5.5 million from the shareholders and say, "Whoa, Whoa, there must have been a mistake here. I thought this was management fees, but now as I'm signing the proxy and doing this, I realize that these are actually -- this is actually – Hollinger International's money."

[15092] No. Despite the fact he owes a duty of loyalty, a duty of honest services, Mr. Kipnis knows -- Mr. Kipnis, even if he believed it at the time, knows -- that it's not and does nothing to get that money back. Nothing.

So, if it's really -- if it's really – just Ravelston Management fees, why don't they tell anyone about this? Why don't they tell a soul about it? Why don't they tell the shareholders, "Hey, this is Ravelston Management fees. We made a mistake."

Not only do they not get the money back, they don't change the disclosures ever about this.

* * * * *

[15095] Finally, materiality. Ladies and gentlemen, it mattered to the Audit Committee and the shareholders why the executives received millions in non-compete payments. You heard the evidence.

What did Ms. Kravis tell you? "Why did you approve getting non-compete money out of CanWest sale?

"We were told it was a requirement of the buyer.

[15096] "Did that matter to you?

"Yes.

"Well, even in the context of a multi-billion dollar deal and, as an Audit Committee member, was it important to you whether 2 million from the deal went to Mr. Atkinson as opposed to Hollinger International?

"Yes.

"Was it important to you whether the $2 million from the deal went to Mr. Boultbee as opposed to Hollinger International?

"Yes.

"Why was it important to you, even in such a large transaction -- large dollar deal?

"Because it's still the $2 million belongs to the shareholders."

They want to tell you that, "Hey, even if we had come in and told the Audit Committee about these non-compete payments, they still would have approved them." Okay.

Full and accurate disclosure. Again, let's remember, if they're going to come in and tell the Audit Committee full and accurate disclosure about the U.S. Community non-competes, what are they going to tell the Audit Committee?

Here's what they would have to tell the Audit Committee, and you make the decision whether this Audit Committee or any Audit Committee would ever have given the **[15097]** okay.

They would have to come in and they would say, "Look, here's the thing. We're working our way -- we're selling off all these newspapers. We have made the company a lot of money over the past decade or so. But we're kind of working our way out of a job. You know, we're newspaper guys and we believe we should get a share of what the company has made.

"But -- but -- you see, there's this new thing in Canada called 'non-competes' where they're tax-free. So, Audit Committee, here's what we'd like to do. What we'd like to do is pay ourselves a portion of the sales proceeds, but we'd like to call them 'non-competes.'

"Let us fill you in on what that's going to require. We are going to have to sign some false documentation at the closings that say that the buyers required them, even though they weren't required.

"Well, why do we have to do that?

"Well, because we're also going to have to file some false disclosures. We're going to have to tell the shareholders that they were required by the buyers as a condition of closing because, you know, the shareholders are not going to like these as is;

but, if they find out that we're just paying ourselves these huge bonuses, they're really going to be upset.

"Oh, and one other thing. So that we can get this **[15098]** significant tax treatment for ourselves -- these tax-free bonuses for ourselves -- there's this little catch for the company. The company is also going to have to file false tax returns with the IRS. Okay? Because in order for us to say that these are legitimate non-competes, we're going to – we can't take this -- the company can't report this money in as income that's then later paid out as executive salaries with bonuses. It's got to report it as if they're real Non-Compete Agreements. Okay? Because that's got to stay consistent with the theme.

"So, Audit Committee, if you're okay with paying us these bonuses so we can get the tax-free treatment, and you're okay with the filing of the false tax returns, the lies that we may have to make to a few auditors, to a few lawyers and more than a few shareholders, then that's what we propose to do."

That would be the full and accurate disclosure in this case. That is what you should be evaluating, in terms of whether it would matter to the audit committee.

* * * * *

[15143] Honestly, when you go back to the jury room, ladies and gentlemen, I have one request. When you consider the transactions in this case, think of those two words. Think of "honest services." And ask yourself, when you consider each transaction, whether that is what the shareholders received. Because, you know, when you buy a share of stock in a public company, there are very few

guarantees. The stock could go up. You could lose your shirt.

But one of the things you should be able to rely upon is the honest services of your officers and directors; the fact that they would be loyal to your interests as a shareholder.

When you evaluate the transactions in this case, ladies and gentlemen, and you just look at those two simple words, you're going to see that that's not what the [15144] shareholders in this case received.

* * * * *

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
vs.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois
	)	December 10, 2007
Defendants.	)	12:50 o'clock p.m.

* * * * *

Sentencing of John A. Boultbee

[222]

MR. GREENBERG: Yes. At least I'll start, your Honor.

And I'd like to start with the supplemental payments because --

THE COURT: Sure.

MR. GREENBERG: -- as I heard you impose sentence and give your reasons regarding defendant Atkinson, you held him responsible for only the amount he received in the supplemental payments --

[223]

THE COURT: Correct.

MR. GREENBERG: -- charged in Count 7.

And yet he, as well as the other defendants, but unlike Mr. Boultbee, received some indication that he was getting a non-compete -- that this check was meant for non-compete.

Mr. Boultbee did not even receive that. There is simply no evidence in this record that Mr. Boultbee was aware of what anyone else got or the amounts that he got. We can speculate all we want that he should have known about somebody else's payment, but that would be pure speculation on this record.

So, he, I believe -- Mr. Boultbee -- is in a better position, stronger position on the evidence on this record on the supplemental payments in Count 7. That is to say, he should only be held responsible for the $15,000 check that he received.

When it comes to the APC check that he got – the hundred and thirty-seven, five -- unlike Mr. Atkinson, Mr. Boultbee, again, received no document whatsoever, no conversation whatsoever indicating what this check was for, who else was getting what. So that all we have is the fact that -- on this record is the fact that -- Mr. Boultbee received a check for 137,500 in regard to APC, in exchange for which he executed a Non-Compete Agreement.

[224] That is it in regard to the evidence of foreseeability of what anyone else received or

whether they received. Not a word of evidence of what others got or how much.

So, our position is that your Honor can hold him legitimately responsible for the 137,5 -- 137,500 -- in Counts 1 -- reflected in Counts 1 -- and 6 on the APC transaction, and for the 15,000 in Count 7. And that totals a hundred and fifty-two thousand, five.

There's simply no evidence here from which anybody could reasonably infer that he should have foreseen, could have foreseen that there was any amount greater, including this 6.1 million figure that the government seeks to hold him responsible for.

MR. SUSSMAN: Your Honor --

THE COURT: Mr. Sussman.

MR. SUSSMAN: -- I'm going to rely on our briefs and Mr. Siskel's argument for the supplemental payments because I don't get the sense that I'm going to be able to argue that any better than Mr. Siskel did, and I think it's fair to say that the evidence is very similar with respect to Mr. Boultbee and Mr. Atkinson.

THE COURT: I will sustain Mr. Boultbee's objection on that, then.

* * * * *

APPENDIX V

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 434 – January 19, 2007]

UNITED STATES OF AMERICA	)	
	)	No. 05 CR 727
v.	)	
	)	Hon. Amy J. St. Eve
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON, and MARK S. KIPNIS	)	

GOVERNMENT'S PRELIMINARY PROPOSED JURY INSTRUCTIONS

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits the attached preliminary proposed jury instructions.

Respectfully submitted,
PATRICK J. FITZGERALD
United States Attorney

By: /s/ Edward N. Siskel
ERIC H. SUSSMAN
JEFFREY H. CRAMER
JULIE B. RUDER
EDWARD N. SISKEL
Assistant United States Attorneys
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5300

Dated: January 19, 2007

* * * * *

INSTRUCTIONS REGARDING

MAIL AND WIRE FRAUD (18 U.S.C. §§ 1341, 1343, and 1346)

FOR COUNTS ONE THROUGH TWELVE

Defendants Black, Boultbee, Atkinson, and Kipnis are charged with mail fraud in Counts One, Five, Six, Seven, and Nine. Defendant Kipnis is charged individually with mail fraud in Count Two. To sustain each charge of mail fraud, the government must prove the following propositions:

First, that the defendant knowingly devised or participated in a scheme to defraud, including a scheme to deprive Hollinger International, Inc. and its shareholders of their right to honest services, or to obtain money or property by means of materially false pretenses, representations, promises, or material omissions, as described in the information;

Second, that the defendant did so knowingly and with the intent to defraud; and

Third, that for the purpose of carrying out the scheme or attempting to do so, the defendant used or caused the use of the United States mails, or a private or commercial interstate carrier in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to a particular count, then you should find the defendant guilty as to that count.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt as to a particular count, then you should find the defendant not guilty of that count.

GOVERNMENT INSTRUCTION NO. 18

Seventh Circuit Committee (1999) 4.01 (modified)
Seventh Circuit Committee (1999)
18 U.S.C. §§ 1341 & 1343
18 U.S.C. § 1346

* * *

Defendant Kipnis is charged individually with wire fraud in Counts Three and Four. Defendants Black, Boultbee, Atkinson, and Kipnis are charged with wire fraud in Count Eight. Defendants Black and Boultbee are charged with wire fraud in Counts Ten, Eleven, and Twelve. To sustain each charge of wire fraud, the government must prove the following propositions:

First, that the defendant knowingly devised or participated in a scheme to defraud, including a

scheme to deprive Hollinger International, Inc. and its shareholders of their right to honest services, or to obtain money or property by means of materially false pretenses, representations, promises, or material omissions, as described in the information;

Second, that the defendant did so knowingly and with the intent to defraud; and

Third, that for the purpose of carrying out the scheme, the defendant caused interstate wire communications to take place in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to a particular count, then you should find the defendant guilty as to that count.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt as to a particular count, then you should find the defendant not guilty of that count.

GOVERNMENT INSTRUCTION NO. 19

Seventh Circuit Committee (1999) 4.01 (modified)
Seventh Circuit Committee (1999)
18 U.S.C. §§ 1341 & 1343
18 U.S.C. § 1346

* * *

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

In considering whether the government has proven a scheme to defraud, it is essential that one or more of the acts charged in the portion of the

information describing the scheme be proved establishing the existence of the scheme beyond a reasonable doubt. However, the government is not required to prove all of them.

A scheme to defraud is a scheme that is intended to deceive or cheat a person or an entity and to obtain money or property or cause the potential loss of money or property to a person or an entity, or to deprive Hollinger International, Inc., its Board of Directors, and its public shareholders of their intangible right to the honest services of the corporate officers, directors, and/or controlling shareholders of Hollinger International, Inc.

GOVERNMENT INSTRUCTION NO. 20

Seventh Circuit Committee (1999) 18 U.S.C. § 1341 & 1343
(Definition of Scheme to Defraud)(modified)

* * *

In considering whether the government has proved a scheme to defraud another of money or property, "property" means not only what we customarily consider property, such as tangible items of value like money or real estate, but also certain intangible rights, such as the right that certain persons have to some kinds of information.

In the context of publicly-owned corporations, such as those traded on national stock exchanges, "property" includes the right of shareholders of such corporations to the full and accurate reporting of the corporation's material economic information so that the shareholders can monitor the behavior of the corporation and its directors and officers in order to protect the value of the shareholders' investments.

This property right also extends to the corporation itself, as represented by its directors and officers uninvolved in the charged offenses. That is, the corporation has the right to certain information so that the corporation can monitor its own actions in order to protect its assets and ensure its actions conform to the law.

GOVERNMENT INSTRUCTION NO. 21

Carpenter v. United States, 484 U.S. 19, 25-6 (1987)
United States v. Wallach, 935 F.2d 445, 463 (2d Cir. 1990)
United States v. D'Amato, 39 F.3d 1249, 1258-59 (2d Cir. 1994)
United States v. Little, 889 F.2d 1367, 1368 (5th Cir. 1989)

* * *

"Honest services" include those duties of honesty, loyalty, fairness, and good faith owed under state law by an agent to his or her principal. An agency relationship arises between a person and an entity when the person consents to act on the entity's behalf and subject to the entity's control, and the entity consents to have the person so act. In that situation, the person is the agent, and the entity is the principal. An agent owes a fiduciary duty to his or her principal – that is to say, the agent has a duty to act with good faith, fairness, loyalty and honesty in all matters entrusted to the agent by the principal. These duties include the duty to make a full and fair disclosure to the principal of all material information relating to the affairs entrusted to the agent, and to act solely for the benefit of the principal in all matters connected with the agency.

GOVERNMENT INSTRUCTION NO. 22

O'Malley v. Boris, 742 A.2d 845 (Del. 1999)
Schock v. Nash, 732 A.2d 217, 225-26 (Del. 1999)
Science Accessories v. Summagraphics, 425 A.2d 957, 962 (Del. 1980)
Johnson v. Carmer, 156 A.2d 499, 503 (Del. 1959)
Restatement (Second) Agency §§ 383, 387, 389 (1958)

"Honest services" include those duties of honesty, loyalty, fairness, and good faith owed under state law by an officer, director or controlling shareholder to a corporation and its public shareholders. Under state law, a corporation's principal officers and directors owe the corporation and its shareholders fiduciary duties of loyalty, honesty, and good faith and therefore must act for the benefit of the corporation and in the best interests of its shareholders. Controlling shareholders, or shareholders who either own a majority interest or exercise control over the business affairs of the corporation, owe the same fiduciary duties to the minority shareholders of the corporation.

GOVERNMENT INSTRUCTION NO. 23

Bomarko, Inc. v. International Telecharge, Inc., 794 A.2d 1161, 1177 (Del. Ch. 1999)
Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993)
Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987)
Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110, 1113-15 (Del. 1994)
Deutsch v. Cogan, 580 A.2d 100 (Del. Ch. 1990)

Harriman v. E.I. Du Pont de Nemours & Co., 372 F. Supp. 101, 105 (D. Del. 1974)

* * *

In this case, at all times relevant to the charges, defendant Conrad Black was an officer, director and controlling shareholder of Hollinger International, Inc.; defendant John Boultbee was an officer and director of Hollinger International, Inc.; defendant Peter Atkinson was an officer and director of Hollinger International, Inc.; and defendant Mark Kipnis was an officer of Hollinger International, Inc. Because of their positions as officers, directors and/or controlling shareholder of Hollinger International, Inc., defendants Black, Boultbee, Atkinson and Kipnis each owed a duty of honest services to Hollinger International, Inc., its Board of Directors, and public shareholders. This means that the defendants were required to serve the corporation's and shareholders' interest with loyalty, honesty and good faith.

GOVERNMENT INSTRUCTION NO. 24

18 U.S.C. § 1346

United States v. Spano, 421 F.3d 599, 602-603 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1084 (2006)

United States v. Hausmann, 345 F.3d 952, 955-56 (7th Cir. 2003), *cert. denied*, 541 U. S. 1072 (2004)

United States v. Sorich, 05 CR 644 (Coar, J.)(modified)

United States v. Fawell, 02 CR 310 (Pallmeyer, J.)(modified)

* * *

Officers, directors and controlling shareholders owe the company a duty of loyalty, which requires that the best interests of the corporation and its shareholders take precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the shareholders generally. The duty of loyalty is implicated when a fiduciary either appears on both sides of a transaction or receives a personal benefit not shared by all shareholders.

GOVERNMENT INSTRUCTION NO. 25

Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993)

Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)

In re Walt Disney Co. Derivative Litig., 2005 WL 2056651, *33 (Del. Ch. 2005)

* * *

Under state law, the fiduciary duties that directors, officers and controlling shareholders of a company owe to the company's non-controlling shareholders require that their related-party transactions with the company meet a standard of "entire fairness." For a related-party transaction to be entirely fair to the corporation there must be both "fair dealing" and a "fair price."

Fair dealing requires that directors, officers and controlling shareholders disclose all material information relevant to a corporate decision from which they may derive a personal benefit. Fiduciaries may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations.

GOVERNMENT INSTRUCTION NO. 26

Bomarko, Inc. v. International Telecharge, Inc., 794 A.2d 1161, 1177 (Del. Ch. 1999)

Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1988)

Weinberger v. UOP, Inc., 457 A.2d 701, 703, 708-12 (Del. 1983)

In re Emerging Communications Inc. Shareholders Litigation, 2004 WL 1043794, *35-36 (Del. Ch. May 3, 2004)

* * *

Undisclosed information is "material" if there is a substantial likelihood that the disclosure of the omitted information would have been viewed by a reasonable member of the Board of Directors, Audit Committee or shareholder as having significantly altered the total mix of information made available.

GOVERNMENT INSTRUCTION NO. 27

TSC Industries v. Northway, 426 U.S. 438, 449 (1976)

Rosenblatt v. Getty Oil Co., Del. Supr., 493 A.2d 929, 944 (Del. 1985)

In re Pure Resources, Inc. Shareholders Litigation, 808 A.2d 421, 448 (Del. 2002)

* * *

Where a corporate officer or director misuses his official position for private gain for himself or another, then that official or employee has defrauded the corporation and its public shareholders of his honest services, if the other elements of the mail or wire fraud offense have been met.

GOVERNMENT INSTRUCTION NO. 28

United States v. Spano, 421 F.3d 599, 602-603 (7th Cir. 2005)
United States v. Bloom, 149 F.3d 649, 656-57 (7th Cir. 1998)
United States v. Sawyer, 85 F.3d 713, 730 n.14 (1st Cir. 1996)
United States v. Warner, 02 CR 506 (Pallmeyer, J.)(modified)
United States v. Fawell, 02 CR 310 (Pallmeyer, J.)(modified)
United States v. Sorich, 05 CR 644 (Coar, J.)(modified)

* * *

A breach of a fiduciary duty owed by an officer, director or controlling shareholder under state law does not in and of itself amount to a violation of the mail or wire fraud statute. That is to say, even if you find beyond a reasonable doubt that an officer, director or controlling shareholder knowingly breached or knowingly schemed to breach his or her fiduciary duty, you must still determine whether the government has proven all of the elements of the crime charged beyond a reasonable doubt.

GOVERNMENT INSTRUCTION NO. 29

United States v. Feldman, 711 F.2d 758, 763 (7th Cir. 1983)

* * *

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat Hollinger International, Inc. and its public shareholders in order to cause a gain of money or property to the defendants or others, or the potential loss of money or property to another, or to

deprive the corporation and its public shareholders of their right to the honest services of their corporate officers.

GOVERNMENT INSTRUCTION NO. 30

Seventh Circuit Committee (1999) 18 U.S.C. §§ 1341 & 13433 (Definition of Intent to Defraud)(modified)

United States v. Spano, 421 F.3d 599, 602-603 (7th Cir. 2005)

United States v. Lombardo, 865 F.2d 155, 159 (7th Cir. 1989)

United States v. Warner, 02 CR 506 (Pallmeyer, J.)(modified)

United States v. Fawell, 02 CR 310 (Pallmeyer, J.)(modified)

United States v. Sorich, 05 CR 644 (Coar, J.)(modified)

United States v. Fuller and Blassingame, 97 CR 428 (Bucklo, J.)

* * *

Each individual component of a scheme need not be illegal when considered separately in order to find a scheme to defraud. It is sufficient that the scheme as a whole involves fraudulent conduct.

GOVERNMENT INSTRUCTION NO. 31

United States v. Brown, 31 F.3d 484, 489 (7th Cir. 1994).

United States v. Feldman, 711 F.2d 758, 764 (7th Cir. 1983)

United States v. Cooke, No. 85 CR 730, 1986 U.S. Dist. LEXIS 15840 (N.D. Ill. Dec. 30, 1986)(Nordberg, J.)

* * *

The mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime or financial gain to the defendants. The scheme to defraud need not have succeeded for the mail or wire fraud statute to be violated.

GOVERNMENT INSTRUCTION NO. 32

Seventh Circuit Committee (1999) 18 U.S.C. § 1341 & 1343 (Loss)

United States v. Spano, 421 F.3d 599, 602-03 (7th Cir. 2005)

United States v. Hausmann, 345 F.3d 952, 959 (7th Cir. 2003)

United States v. Yoon, 128 F.3d 515, 525 (7th Cir. 1997)

United States v. Lombardo, 865 F.2d 155, 159 (7th Cir. 1989)

United States v. Warner, 02 CR 506 (Pallmeyer, J.)(modified)

United States v. Segal, 02 CR 112 (Castillo, J.)(modified)

United States v. Sorich, 05 CR 644 (Coar, J.)(modified)

* * *

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrue to others, so long as the government has proved the other elements of mail or wire fraud beyond a reasonable doubt.

A corporation and its public shareholders may be deprived of its corporate officers' honest services no matter who receives the benefits of the fraud, so long as the government has proved the other elements of mail or wire fraud beyond a reasonable doubt.

GOVERNMENT INSTRUCTION NO. 33

United States v. Spano, 421 F.3d 599, 602-03 (7th Cir. 2005)
United States v. Lombardo, 865 F.2d 155, 159 (7th Cir. 1989)
United States v. Warner, 02 CR 506 (Pallmeyer, J.)
United States v. Sorich, 05 CR 644 (Coar, J.)(modified)

* * *

In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable financial harm to the victims of the scheme.

GOVERNMENT INSTRUCTION NO. 34

United States v. Hausmann, 345 F.3d 952, 959 (7th Cir. 2003)
United States v. Fernandez, 282 F.3d 500, 506-07 (7th Cir. 2002)
United States v. Segal, 02 CR 112 (Castillo, J.)
United States v. Warner, 02 CR 506 (Pallmeyer, J.)

* * *

If you find beyond a reasonable doubt that a defendant deprived Hollinger International, Inc. and its public shareholders of their right to honest services, it is not a defense that the same official action would have resulted absent the defendant's deprivation of the corporation's and its shareholders' right to honest services.

GOVERNMENT INSTRUCTION NO. 35

United States v. Sawyer, 85 F.3d 713, 730 n.14 (1st Cir. 1996)

* * *

The mail or wire fraud statute can be violated whether or not anyone actually relied on the false statements, pretenses, representations or promises described in the information. The government need only prove that the false statements, pretenses, representations or promises were material, in the sense of having a tendency to influence the decision of the person or entity to which they were addressed.

GOVERNMENT INSTRUCTION NO. 36

United States v. Rosby, 454 F.3d 670, 674 (7th Cir. 2006)

* * *

After-the-fact ratification of a decision that was made based on false statements, pretenses, representations, or promises, is not a defense to mail or wire fraud where the government has proved the defendants were acting with the intent to defraud.

GOVERNMENT INSTRUCTION NO. 37

United States v. De La Cruz, 469 F.3d 1064, 1068 (7th Cir. 2006)

* * *

As to the mail fraud counts, the government must prove that the United States mails or a private or commercial interstate carrier were used to carry out the scheme, or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States mails or a private or commercial interstate carrier, a defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur, or that the defendant knew that it would occur in the ordinary course of business, or that the defendant knew facts

from which that use could reasonably have been foreseen. However, the government does not have to prove that a defendant knew that the carrier was an interstate carrier.

The defendant need not actually or personally use the mail or an interstate carrier.

Although an item mailed or sent by interstate carrier need not by itself contain a fraudulent representation or promise or request for money, it must further or attempt to further the scheme.

Each separate use of the mail or an interstate carrier in furtherance of the scheme to defraud constitutes a separate offense.

GOVERNMENT INSTRUCTION NO. 38

Seventh Circuit Committee (1999) 18 U.S.C. § 1341 & 13433(Use of Mails/Interstate Carrier/Interstate Communication Facility) (modified)

* * *

In connection with whether a mailing was made, evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. You should consider this evidence in the same manner that you consider all circumstantial evidence.

GOVERNMENT INSTRUCTION NO. 39

United States v. Keplinger, 776 F.2d 678, 691 (7th Cir. 1985)

United States v. Ledesma, 632 F.2d 670, 674 (7th Cir. 1980)

Fed. R. Evid. 406

United States v. Warner, 02 CR 506 (Pallmeyer, J.)
United States v. Sorich, 05 CR 644 (Coar, J.)

* * *

As to the wire fraud counts, the government must prove that interstate communication facilities were used to carry out the scheme, or were incidental to an essential part of the scheme.

In order to cause interstate wire communications to take place, a defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur, or that the defendant knew that it would occur in the ordinary course of business, or that the defendant knew facts from which that use could reasonably have been foreseen. However, the government does not have to prove that a defendant knew that the wire communication was of an interstate nature.

The defendant need not actually or personally use the interstate communication facilities.

Although an item communicated interstate need not by itself contain a fraudulent representation or promise or request for money, it must further or attempt to further the scheme.

Each separate use of interstate communication facilities in furtherance of the scheme to defraud constitutes a separate offense.

GOVERNMENT INSTRUCTION NO. 40

Seventh Circuit Committee (1999) 18 U.S.C. § 1341 & 1343 (Use of Mails/Interstate Carrier/Interstate Communication Facility)

The following types of transmissions constitute transmissions by means of wire communication in interstate commerce within the meaning of the wire fraud statute: e-mails, faxes, filing of public documents by wire, and electronic money transfers.

GOVERNMENT INSTRUCTION NO. 41

Seventh Circuit Committee (1999) 18 U.S.C. § 1343 (Interstate Communication)

* * *

A person may commit mail or wire fraud without personally committing every fraudulent act that is part of that scheme. A co-schemer is responsible for acts of his fellow co-schemers if he was a participant in the scheme when the acts were committed and if the acts were committed in furtherance and as a foreseeable consequence of the scheme.

Therefore, if you find beyond a reasonable doubt that a defendant was a member of a scheme at the time that one of his fellow co-schemers committed one of the mail or wire fraud counts charged in the information in furtherance of and as a foreseeable consequence of that scheme, then you should find that defendant guilty of that count.

GOVERNMENT INSTRUCTION NO. 42

Seventh Circuit Committee (1999) 5.10 (modified)
United States v. Sorich, 05 CR 644 (Coar, J.)(modified)
United States v. Stapleton, 293 F.3d 1111, 1115-17 (9th Cir. 2002)
United States v. Macey, 8 F.3d 462, 468 (7th Cir. 1993)
Untied States v. Funt, 896 F.2d 1288, 1294 (11th Cir. 1990)

United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981)
United States v. Kelly, 507 F. Supp. 495, 504 n.15 (E.D. Pa. 1981)

* * * * *

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

Government's Preliminary Proposed Jury Instructions

was served on January 19, 2007, in accordance with FED. R. CRIM. P. 5, LR 5.5, and the General Order on Electronic Filing (ECF) pursuant to the district court's system as to ECF filers.

/s/ Edward N. Siskel

EDWARD N. SISKEL
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois
(312) 353-3500

APPENDIX W

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 491 – March 1, 2007]

UNITED STATES OF AMERICA	)	
	)	No. 05 CR 727
v.	)	
	)	Hon. Amy J. St. Eve
CONRAD M. BLACK, et al.	)	
	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS' JURY INSTRUCTIONS BRIEF CONCERNING DELAWARE CORPORATE LAW

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this response to defendants' jury instruction brief concerning Delaware corporate law. Defendants make three arguments against the government's instructions on Delaware fiduciary duties, none of which has merit or requires modification of the government's proposed instructions. Defendants contend that: (1) corporate fiduciaries do not have a duty to disclose related-party transactions and obtain approval for them

from the company's board of directors so long as the transaction is fair to the company; (2) the government's proposed instructions conflate a civil standard of materiality with the criminal standard; and (3) post-hoc ratification of an unauthorized act by officers relates back and has the same force and effect as contemporaneous approval. Defendants' arguments misstate Delaware law, mischaracterize the government's proposed instructions, and fundamentally misunderstand the nature of the government's evidence at trial.

I. The Duty of Loyalty, Disclosure and Fairness of the Transaction

Despite the tone of their brief, defendants and the government agree about a substantial amount of Delaware law governing fiduciary duties and how a violation of those duties relates to an honest-services fraud. Defendants do not dispute that corporate officers, directors and controlling shareholders owe a duty of loyalty to the corporation under Delaware law, that the duty of loyalty "requires fiduciaries to protect the corporation's interests and to refrain from acting in a manner harmful to the corporation," and that duty of loyalty can be violated by related-party transactions where "fiduciaries engage in transactions by which they profit at the corporation's expense and which are unfair to the corporation." Def. Brief at 3-4. Moreover, the government and defendants agree that a scheme to defraud a corporation and its shareholders of the right to honest services can be based on a violation of the fiduciary duties owed by officers, directors and controlling shareholders, provided the government proves the other elements of mail or wire fraud,

including the intent to defraud, beyond a reasonable doubt.[1]

Nonetheless, defendants assert that the government's theory of honest-services fraud cannot be sustained, because (1) it is based on defendants' inaction, and (2) Delaware law does not impose a duty on fiduciaries to disclose information concerning related-party transactions. Def. Brief at 3, 6, 8. Defendants are wrong on both counts. As an initial matter, defendants mischaracterize the government's theory and evidence when they assert that "the heart of the government's alleged fraud scheme is the defendant's inaction." The government has alleged and will prove at trial that defendants carried out their fraud schemes by making false statements, material misrepresentations and misleading partial disclosures. Moreover, these affirmative misrepresentations were made not only to the Audit Committee, but to the Board of Directors, to outside counsel and auditors assisting the corporation, and to the company's public shareholders. The Superseding Information and *Santiago* Proffer make clear that the government's theory is that defendants

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[1] Defendants spend a substantial portion of their brief arguing that breach of a fiduciary duty alone cannot constitute an honest-services fraud. Def. Brief at 1-3. The government agrees. That is why the government proposed an instruction that makes clear to the jury that "[a] breach of a fiduciary duty owed by an officer, director or controlling shareholder under state law does not in and of itself amount to a violation of the mail or wire fraud statute," and directs the jury that even if it finds a breach, it "must still determine whether the government has proven all of the elements of the crime charged beyond a reasonable doubt." GI No. 29.

intentionally lied to the Audit Committee, Board of Directors and shareholders about whether the buyers of newspaper assets insisted on certain non-compete covenants, how those non-compete agreements were valued, and the details of other related-party transactions. *See e.g.*, Superseding Information at Count Eight ¶¶ 4, 7-16; Count 10 ¶¶ 7, 11, 21; *Santiago* Proffer at 28-30; 36-37; 47; 52-55; 63; 64-65. And the government will demonstrate that when defendants made disclosures to the Audit Committee, Board of Directors and public shareholders, they either outright lied or withheld material information in a way that was equally misleading to those who received the disclosures. Such partial disclosures violated defendants' duty of disclosure under Delaware law. *In re MONY Group S'holder Litig.*, 852 A.2d 9, 24-25 (Del. Ch. 2004)("[O]nce [directors] take it upon themselves to disclose information, that information must not be misleading."); *Clements v. Rogers*, 790 A.2d 1222, 1240 (Del. Ch. 2001)("Delaware disclosure law also proscribes misleading partial disclosures. When fiduciaries undertake to describe events, they must do so in a balanced and accurate fashion, which does not create a materially misleading impression."); *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994)("once [directors] traveled down the road of partial disclosure . . . an obligation to provide the stockholders with an accurate, full and fair characterization" attaches).[2]

---

[2] Particularly when making representations to the shareholders about approval of certain related-party transactions by independent directors, defendants were under an affirmative obligation to ensure that the

More importantly, contrary to defendants' claim, Delaware law *does* impose fiduciary duties on officers, directors and controlling shareholders to disclose material information about transactions in which they have a financial interest. As part of their duty of loyalty to the corporation, directors have an "unremitting obligation" to deal candidly with their fellow directors. *HMG/Courtland Properties, Inc. v. Gray*, 749 A.2d 94, 119 (Del. Ch. 1999); *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261,1283 (Del. 1988).[3] That obligation requires corporate fiduciaries not only to refrain from lying to the Board and shareholders, but "to take affirmative steps to disclose [a director's] interest" in a particular transaction. *HMG/Courtland*, 749 A.2d at 119 (quoting 1 *Principles of Corporate Governance; Analysis & Recommendations* § 5.02 at 215 (1994)("interested director must 'affirmatively disclose the material facts known to the director' and

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[Footnote continued from previous page]

information they were disseminating was accurate and provided full disclosure of all material information. *See In re Trans World Airlines*, 1988 WL 111271, * 12 (Del. Ch. 1988)("No disclosure in a case such as this is presumably of greater importance to a shareholder than a disclosure that independent directors have actively negotiated on his behalf and have concluded, as here, that acceptance of the proposal is in his best interests.").

[3] Indeed, because "the duty of candor is one of the elementary principles of fair dealing, Delaware law imposes this unremitting obligation not only on officers and directors, but also upon those who are privy to material information obtained in the course of representing corporate interests." *MacMillan*, 559 A.2d at 1283.

'explain the implications of a transaction'")). Delaware courts thus have found that when an interested director's silence is "misleading and deceptive" to fellow directors, failure to disclose that information is "a fraud on the board." *MacMillan*, 559 A.2d at 1283.

In addition, fiduciaries have an affirmative duty to disclose all material information to the company's shareholders. When a company submits proxy materials to its shareholders so that they can make informed decisions about the management and direction of the company, directors have an affirmative duty to ensure that the proxy statement discloses all material information. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140-41 (Del. 1997)(describing "general duty of directors to disclose to stockholders all material information reasonably available when seeking shareholder action"); *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund*, 824 A.2D 11, 17-18 (Del. Ch. 2002)(duty to disclose material information to shareholders was violated where proxy statement omitted information about financial interest of certain directors that "would almost certainly be considered important in the context of an election of directors"). Thus, defendants had a duty when filing proxy statements that disclosed director compensation, related-party transactions and the use of perquisites to disclose all material information about those subjects and not to mislead the shareholders. Nor is this obligation to make full and accurate disclosure limited to a specific request for shareholder action. To the contrary,

> [w]henever directors communicate publicly or directly with shareholders about the

> corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a fortiorari* that when directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of director's fiduciary duty to shareholders is honesty.

Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998). Moreover, defendants' brief simply ignores the fact that the Board of Directors of International established a standing Audit Committee with the mandate to review related-party transactions and to protect the interests of the shareholders during such transactions. Once that Committee was established and given authority by the Board to vet interested transactions, defendants had a duty to disclose such transactions to the Committee rather than pick and choose on their own which related-party transactions to disclose and which to keep secret based on the possibility that the transaction may ultimately prove to be entirely fair.

Defendants' arguments to the contrary are misplaced. For example, defendants invoke the business-judgment rule to suggest their actions in inserting themselves as non-compete covenantors, taking money that would otherwise have gone to the shareholders and lying about it to the Board might not be a breach of fiduciary duty, if they reasonably thought they were acting in the best interests of the company. Def. Brief at 4, 9. Delaware law makes clear, however, that the presumption afforded by the business-judgment rule does not apply under these circumstances. First, the business-judgment rule

does not protect the actions of a controlling shareholder that has a financial interest in a transaction. *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997)("[W]hen a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed *under the more exacting standard of entire fairness* as opposed to the more deferential business judgment standard")(emphasis added); *Kahn v. Lynch Comm. Sys., Inc.*, 638 A.2d 1110, (Del. 1994)(same); Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983)(same).

Second, for purposes of determining whether an officer or director has breached the duty of loyalty to the corporation, transactions involving the officer or director's self-interest are not afforded the benefit of business-judgment rule. *Stanziale v. Nachtomi*, 330 B.R. 56, 60 (D. Del. 2004)("Under Delaware law, the business judgment rule operates as a presumption 'that directors making a business decision, *not involving self-interest*, act on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interests.")(quoting *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988)(emphasis added). The business-judgment rule does not apply where there are well-pleaded facts establishing that the directors acted out of self-interest or received a benefit not shared by the corporation as a whole. *Ryan v. Tad's Enterprises*, Inc., 709 A.2d 682, (Del. 1996); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).[4] Third, even if a

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[4] For these purposes it is well-established that "[d]irectors act in self-interest if they appear on 'both sides of the transaction, or . . . [derive] any personal financial benefit from it which did not devolve upon the

transaction is not a self interested one, the business-judgment rule does not protect an officer, director or controlling shareholder where, as here, there are specific allegations of fraud. *Bomarko Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1178 (Del. 1999) ("business judgment rule is rebutted if there is evidence of disloyalty, including . . . fraud upon the corporation or the board"); *MacMillan*, 559 A.2d at 1279 (a court's "reluctance to assess the merits of a business decision ends in the face of illicit manipulation of a board's deliberative process by self-interested corporate fiduciaries").

Based on each of these factors, the more exacting standard of entire fairness applies to defendants' conduct. Consequently, defendants' proposed instruction number 21, incorporating the business-judgment rule ("If you find that each element is present but also find that the defendant reasonably

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corporation and the shareholders generally.'" *Stanziale*, 330 B.R. at 61 (quoting *In re General Motors Class E Stock Buyout Sec. Litig.*, 694 F.Supp 1119, 1132 (D. Del. 1988)). Defendants' suggestion that such self-interested transactions need to be distinguished from an executive negotiating terms of his employment agreement or compensation is absurd. Def. Brief at 4; DI No. 25-A. The government's proposed instructions make abundantly clear that the corporate officer or director has to be negotiating on both sides of the transaction or receiving a personal benefit from the transaction that is not shared by the shareholders generally. GI No. 25. An executive engaged in salary negotiations with the company is representing himself, not appearing on both sides of the transaction, nor is their any potential confusion about who is receiving the benefit from the transaction.

believed that his actions accomplished an important company objective, then he cannot be convicted"), is inconsistent with Delaware law and will only mislead the jury.

Defendants are also wrong in arguing that the provisions of Section 144 define the extent of their fiduciary duties in this case. Section 144 deals with the related but distinct situation of a challenge to a board decision on the ground that one of the directors had an financial interest in the transaction or was otherwise disloyal. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 365 (Del. 1993) ("Enacted in 1967, section 144(a) codified judicially acknowledged principles of corporate governance *to provide a limited safe harbor for corporate boards to prevent director conflicts of interest from voiding corporate action.*") (emphasis added). Section 144 does not address whether that director violated his or her fiduciary duty to the company in the first place; only whether the self-interest of that director so infects the rest of the Board that the action taken by the Board is voidable. *Id.* at 363. As the Delaware Supreme Court explained in *Fliegler v. Lawrence*, 361 A.2d 218, 222 (Del. 1976), section 144 "merely removes an 'interested director' cloud when its terms are met and provides against invalidation of an agreement 'solely' because such a director or officer is involved." In that situation, section 144 provides that the Board's action does not need to be undone if the Board knew all of the details and still approved the transaction or if the transaction was fair to the company. The government is not seeking to unwind the transactions at issue in this case, rather the defendants are charged with, *inter alia*, breaching their fiduciary duties to look out for the best

interests of the corporation over their own when negotiating on the company's behalf.

In any event, defendants ultimately concede that their actions must meet the heightened standard of entire fairness. Def. Brief at 6. The real issue is the nature of that standard and how the jury should be instructed to apply that standard. Delaware law is clear that when this more stringent standard applies, the interested directors bear the burden of proving the entire fairness of their self-interested transaction. As the Delaware Supreme Court stated in *Weinberger v. UOP, Inc.*:

> There is no "safe harbor" for ... divided loyalties in Delaware. When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain.... The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.

457 A.2d at 710.[5]

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[5] Contrary to well-established Delaware law placing the burden on interested directors to establish the entire fairness of their related-party transactions, defendants' proposed instructions attempt to turn this exacting standard into a shield, requiring the government to prove the unfairness of the transaction. To the extent defendants seek to justify their actions based on the fairness of the transaction, therefore, their argument is akin to an affirmative defense. In *United States v.*

To meet their burden of proving the entire fairness of the transactions, defendants must establish both fair dealing and a fair price. In assessing the fairness of the process by which a transaction was carried out (*i.e.*, "fair dealing"), courts consider, *inter alia*, the structure and negotiation of the transaction, how the board and shareholder approval were obtained and whether the board and the shareholders were accurately informed about the transaction. *Tad's Enterprises*, 709 A.2d at 690. Key among these factors is whether corporate officers or directors misled their fellow directors about the related-party aspects of the transaction. As the government's proposed instructions explain, fair dealing "also embraces the duty of candor owed by

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Skeedle, 940 F. Supp. 1146 (N.D. Ohio 1996) – – an honest-services fraud prosecution based on corporate officers' undisclosed self-dealing – – the court recognized that the unfairness of the underlying transactions was not an element of the offense but rather an affirmative defense. In that case, defendants sought to argue, under Ohio's equivalent of Delaware's section 144, *see id.* at 1152 n.6, that they did not breach their fiduciary duty to the corporation by failing to disclose their self-interest in the transactions, because the transactions were fair to the company. The court noted that under Ohio law, as with Delaware law, the "miscreant corporate officer has the burden of proving the fairness of the transaction if he is to escape the adverse consequences of his misconduct," *id.* at 1151, and concluded that "any defendant who contends that any breach of fiduciary obligations is excused due to the fairness of the transaction shall have the burden of going forward with evidence as to, and ultimately proving the fairness of, the particular transaction." *Id.* at 1153. Defendants cannot possibly satisfy that burden on the evidence in this case.

corporate fiduciaries to disclose all material information relevant to corporate decisions from which they may derive a personal benefit." *MacMillan*, 559 A.2d at 1280. This means that fiduciaries "may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations." *Id.* at 1283. The government's proposed jury instruction No. 26 defines fair dealing according to this well-settled law.

Defendants point out that the entire-fairness standard includes consideration of the fairness of the price and not just the process. Def. Brief at 10. For that reason, the government's proposed instruction lists "fair price" as one of the components of the entire-fairness standard. GI No. 26. To the extent defendants seek to define fair price further, their proposed language is misleading. Defendants would instruct the jury that fair price "has to do with the economic and financial considerations of the transaction." Def. Brief at 10; DI No. 26-A. This language is not only vague, but gives the impression that unrelated economic and financial aspects of the transaction are relevant to the jury's determination. Instead, fair price refers to the specific self-interested aspects of the transaction at issue, not general financial considerations, such as whether the company made a profit on the deal.

Thus, in *Tad's Enterprises*, where directors negotiated non-competition agreements for themselves that were challenged as sham non-competes unfairly taken out of the purchase price, the court looked to the fairness of the price *for those non-competes themselves*, not the overall economics of the transaction, and concluded that the non-competes were unfair. 709 A.2d at 694- 695.

Similarly, in *Bomarko*, the court analyzed the fairness of an $8 million side payment that the company's CEO received in exchange for his support for a transaction, and concluded that "the fact that the deal may have benefitted [the company] is not dispositive of whether [the CEO's] acts entitled [the company] to recover the fee from him . . . a disloyal fiduciary is not entitled to profit from his breach." 794 A.2d at 1188. Here, fair price cannot be judged based on the CanWest transaction as a whole, and defendants should be precluded from arguing that the profitability of the CanWest transaction to International in general somehow excuses their breach of the duty of loyalty. Rather, fair price in this case must be analyzed in terms of the fairness of the non-competes themselves. Moreover, it should be noted that the unfairness of the process by which a related-party transaction was carried out can so permeate the negotiation of the transaction as to infect the fairness of the price. *Bomarko*. 794 A.2d at 1183. That is the case here.

II. Materiality Standard

Defendants next assert that the government has conflated civil and criminal standards of materiality in a way that will mislead the jury into believing that it can find the defendants guilty of mail or wire fraud based on a lower standard of materiality. Def. Brief at 6-7. The government's proposed instructions do no such thing. The fact is that there are two different materiality issues at play in the instructions, and the jury must be informed about both of them. First, there is the materiality of defendants' false statements, misrepresentations and omissions, as an element of fraud. The proposed instructions make abundantly clear that the false

statements must be material "in the sense of having a tendency to influence the decision of the person or entity to which they were addressed." GI No. 36. This is the same standard of materiality proposed by defendants in their instructions, DI No. 27 ("A misrepresentation or omission is material if it would naturally tend to lead or is capable of leading a reasonable decisionmaker to change its conduct"). The government's version makes clear, however, that materiality does not require proof that the information was actually relied on by the decisionmaker. Defendants are free to argue from the government's proposed instruction, as they do in their brief (Def. Brief at 14-15), that information omitted from disclosures on the CanWest transaction could not be material because the Audit Committee approved the transaction even after hearing two different explanations for the non-compete payments.

That said, there is a separate issue as a matter of Delaware fiduciary duties, whether a related-party transaction has been adequately presented to the Board of Directors and shareholders. In that context, the materiality of the information does not require a showing that the omitted information would tend to lead the Board or shareholders to change their conduct. Instead, it simply requires that the omitted information would have been significant to the total mix of information before them. *See e.g.*, *Rosenblatt v. Getty Oil Co.*, *Del. Supr.*, 493 A.2d 929, 944 (Del. 1985); *HMG/Courtland*, 749 A.2d at 114-15. The government's proposed instruction makes clear that this determination is within the narrow context of deciding whether defendants breached their fiduciary duty. The jury will be instructed that even if they find a breach of fiduciary duty, the

government must still prove the remaining elements of mail or wire fraud, including the intent to defraud and the materiality of the false statements or omissions. GI No. 29. In contrast, by failing to distinguish between these two aspects of materiality, defendants' instructions would impose a burden on the government that is not supported by law.

III. After-the-Fact Ratification Cannot Salvage Defendants' Honest-Services Fraud

Defendants also mistakenly assert that ratification of a decision that never received the approval of the Audit Committee or that was based on misrepresentations "has the same force and effect as contemporaneous approval." Def. Brief at 7. Put simply, the doctrine of ratification relied on by defendants has no relevance to decisions that were made as a result of their fraud. *See e.g.*, *Michelson v. Duncan*, 407 A.2d 211, 218-19 (Del. 1979) (distinguishing between voidable acts "performed in the interest of the corporation but beyond the authority of management," and void acts "which are Ultra vires, fraudulent or gifts or waste of corporate assets," and explaining that "voidable acts are susceptible to cure by shareholder approval while void acts are not"). Defendants ignore the fact that this is a criminal case in which they are charged with making false statements and misrepresentations to the Audit Committee, Board of Directors and public shareholders with the intent to defraud the company.[6] Under these circumstances, ratification is not a defense.

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[6] An honest services mail or wire fraud theory properly incorporates state law regarding fiduciary duties, so long

In the civil context, the doctrine of ratification stems from two interrelated concerns: (1) that courts are unwilling to unwind a transaction for a technicality that has been corrected after the fact, and (2) there are no recognizable damages when the defect has been cured. Neither of these concerns is at play where defendants have been charged with criminal fraud. Their fraud on the company was complete at the time they diverted money to themselves, and it cannot be cured after the fact. By way of analogy, a bank teller who steals $1000 from his employer on a Friday night intending to gamble the money over the weekend might be excused from civil liability if he hit the jackpot and repaid the money with interest on Monday morning, but the employee has still committed criminal embezzlement.

The cases cited by defendants are thus inapposite. For example, *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531 (Del. Ch. 1999), cited by defendants (Def. Brief at 7), involved a suit to undo a Board decision based on a highly technical defect in the voting rights of the directors that voted for the decision. The Board members had been newly elected to the Board when they voted in favor of the action, but under the by-laws of the corporation they did not yet have authority to vote. Once their voting powers

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as the instructions make clear that the government must prove the other elements of fraud. That does not mean, however, that state law defenses to civil liability arising under entirely different circumstances can be taken out of context and imported into a criminal case as affirmative defenses.

became effective, the Board ratified its earlier decision. *Id.* at 539- 40. The Court held that it would not unwind the transaction based on this technical defect, in light of the fact that it had subsequently been ratified. *Id.* The facts of ***Kalageorgi*** are distinguishable from the instant charges. The government has charged defendants with committing a fraud on the Board of Directors and shareholders of International by lying about the non-compete payments that individuals and Inc. received. There is no evidence of any after-the-fact ratification of those transactions or payments. More importantly, any supposed ratification would have been based on the same false statements, misrepresentations and material omissions that occurred when the transactions first took place.

By invoking cases concerning post-hoc ratification, defendants are clearly attempting to set up the argument that certain vague Executive Committee consents which were subsequently adopted by the Board acted as a ratification of the non-compete payments. Defendants cannot support such an instruction based on the evidence in this case, and to give such an instruction would only mislead the jury into believing that such consents could serve to cure the fraud carried out by the defendants. As Vice Chancellor Strine observed in rejecting a similar argument made by defendant Black during the Delaware litigation:

> I do not discern in these consents evidence of proper approval by independent directors of a conflict transaction. Rather, they contain references to possible conflict transactions buried in a pile of legalese. They hardly put one on clear notice of what is contemplated,

> and surely do not purport to approve the specific terms of any non-competes to conflicted parties, such as Inc. and Black. . . . If anything, the December 2000 board minutes are suggestive of what, in the old days, might have been called constructive fraud. The inference from the record one inescapably inclines towards is that the consents were drafted to give the least possible notice of their non-compete references, were not actually placed before the board, and were ratified by a board that never saw them and was not informed that they contained within them authorization for officers to negotiate future conflict transactions in favor of other unspecified officers. That is, by their own terms, the consents do not even approve specific non-competition contracts.

844 A.2d at 1068. Similarly, any attempt to argue that the Audit Committee ratified the CanWest non-compete payments during its May 2001 meeting is also inappropriate and misleading to the jury. As the government alleges in the Superseding Information and will prove at trial, defendants sought ratification from the Audit Committee on different grounds from the initial presentation, but based on yet another set of false statements and misrepresentations. Count Eight, ¶¶ 12-14 . Any supposed ratification cannot cure defendants' prior misstatements or omissions if the ratification was based on the same or new false information. Delaware courts have long recognized: "One cannot ratify that which he does not know. The burden is on him who relies on a ratification to show that it was made *with a full knowledge of all material facts*." *Cahall v. Lofland*, 114 A. 224, 234

(Del. 1921). *See also Sample v. Morgan*, 914 A.2d 647, 664 (Del. Ch. 2007) (rejecting directors' ratification argument because they "failed to demonstrate that they disclosed all the material facts") (emphasis added); *Michelson v. Duncan*, 407 A.2d 211, 220 (Del. 1979) ("[s]hareholder ratification is valid only where the stockholders so ratifying are adequately informed").

VI. CONCLUSION.

For the reasons stated above, the Court should adopt the government's proposed jury instructions on Delaware law regarding fiduciary duties as they relate to the scheme to deprive International of the right to honest services.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/ Edward N. Siskel
ERIC H. SUSSMAN
JEFFREY H. CRAMER
JULIE B. RUDER
EDWARD N. SISKEL
Assistant U.S. Attorneys
219 South Dearborn Street,
Room 500
Chicago, Illinois 60604
(312) 353-5300

APPENDIX X

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 602 – April 30, 2007]

UNITED STATES OF AMERICA,	)	
	)	No. 05 CR 727
v.	)	
	)	Hon. Amy J. St. Eve
CONRAD M. BLACK, PETER Y. ATKINSON, JOHN A. BOULTBEE, and MARK S. KIPNIS,	)	

Respectfully submitted,
PATRICK J. FITZGERALD
United States Attorney

By: _____

ERIC H. SUSSMAN
JEFFREY H. CRAMER
JULIE B. RUDER
EDWARD N. SISKIEL
Assistant United States Attorneys
219 South Dearborn Street
Chicago, Illinois 60604

GOVERNMENT'S SUBMISSION OF CERTAIN REVISED PROPOSED JURY INSTRUCTIONS

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, hereby respectfully submits certain revised proposed jury instructions as requested by the Court.

On April 16, 2007, the Court asked the Government to meet and confer with defense counsel regarding a group of proposed jury instructions and to file revised version of those instructions by April 30, 2007. On April 26, 2007, counsel for the government met with defense counsel regarding a revised set of government proposed instructions. Although the instructions submitted in this filing incorporate some comments from defense counsel, they are not agreed instructions. Moreover, as stated to the Court during the April 27, 2007 jury instruction conference, the government and defense counsel are still working on revised proposed instructions regarding the "entire fairness" standard and ratification.

Respectfully submitted,

PATRICK J. FITZGERALD United States Attorney

By: Edward N. Siskel
ERIC H. SUSSMANN
JEFFREY H. CRAMER
JULIE B. RUDER
EDWARD N. SISKEL

All of the defendants are charged with mail fraud in Counts One, Five, Six, Seven and Nine, and with wire fraud in Count Eight. Defendant Kipnis is charged individually with mail fraud in Count Two and wire fraud in Counts Three and Four. Defendants Black and Boultbee are charged with wire fraud in Counts Ten, Eleven and Twelve.

To sustain each charge of mail or wire fraud, the government must prove the following propositions:

First, that the defendant knowingly devised or participated in a scheme to defraud, or to obtain money or property by means of materially false pretenses, representations, promises, or material omissions, as described in the Information;

Second, that the defendant did so knowingly and with the intent to defraud; and

Third, that for the purpose of carrying out the scheme or attempting to do so, the defendants in the mail fraud counts used or caused the use of the United States mails, or a private or commercial interstate carrier in the manner charged in the particular count, and the defendants in the wire fraud counts caused the use of an interstate wire communication in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to a particular defendant and a particular count, then you should find that defendant guilty as to that count.

If, on the other hand, you find from your consideration of all the evidence that any one of

these propositions has not been proved beyond a reasonable doubt as to a particular defendant and a particular count, then you should find that defendant not guilty of that count.

GOVERNMENT REVISED INSTRUCTION NO. 18[1]

Seventh Circuit Committee (1999) 4.01 (modified)
Seventh Circuit Committee (1999) 18 U.S.C. §§ 1341 & 1343

* * *

The Information in this case charges defendants with committing mail and wire fraud in two different ways: First, defendants are charged with mail and wire fraud for participating in a scheme to obtain money or property by means of materially false pretenses, representations, promises, or material omissions. Second, defendants are charged with mail and wire fraud for participating in a scheme to deprive Hollinger International and its public shareholders of their intangible right to the honest services of the corporation's officers, directors and/or controlling shareholders.

You are instructed that one crime can be committed in two different ways. In weighing each of the theories of mail and wire fraud charged in the

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[1] Government Revised Instruction No. 18 consolidates the prior Government Instructions 18 and 19 into one instruction covering both the mail and wire fraud counts. The revised instruction also removes reference to the "honest services" fraud from the discussion of element one. The Court has reserved ruling on the issue of whether the elements instruction will include a reference to "material omissions." The government continues to propose this language and defense counsel object.

Information, you must consider whether the government has proved each of the elements of mail and wire fraud beyond a reasonable doubt. You will be provided with a verdict form that directs you to consider each theory of mail or wire fraud separately.

GOVERNMENT NEW INSTRUCTION NO. 19[2]

18 U.S.C. §§ 1341, 1343 & 1346

* * *

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

In considering whether the government has proven a scheme to defraud, it is essential that one or more of the false pretenses, representations or promises and acts charged in the portion of the Information describing the scheme be proved establishing the existence of the scheme beyond a reasonable doubt. However, the government is not required to prove all of them.

A scheme to defraud is a scheme that is intended to deceive or cheat a person or an entity and to obtain money or property and cause the potential loss of money or property to a person or an entity, or to deprive Hollinger International and its public shareholders of their intangible right to the honest services of the corporate officers, directors, and/or controlling shareholders of Hollinger International.

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[2] As discussed at the March 12, 2007 jury instruction conference, and suggested by the Court, the government has proposed Government New Instruction No. 19 to explain that the government is pursuing both a tangible property rights theory and an intangible honest services theory of fraud.

GOVERNMENT REVISED INSTRUCTION NO. 20

Seventh Circuit Committee (1999) 18 U.S.C. § 1341 & 1343 (Definition of Scheme to Defraud)(modified)

* * *

In considering whether the government has proved a scheme to defraud another of money or property, "property" means not only what we customarily consider property, such as tangible items of value like money or real estate, but also certain intangible property, such as the right to accurate information about matters that are material to a person or entity's decision making.

In the context of publicly-owned corporations, such as those traded on national stock exchanges, "property" includes the right of shareholders of such corporations to the full and accurate reporting of the corporation's material economic information.

This property right also extends to the corporation itself, as represented by its directors and officers uninvolved in the charged offenses. That is, the corporation's officers and directors have the right to the full and accurate reporting of the corporation's material economic information.

GOVERNMENT REVISED INSTRUCTION NO. 21

Carpenter v. United States, 484 U.S. 19, 25-6 (1987)
United States v. Wallach, 935 F.2d 445, 463 (2d Cir. 1990)
United States v. D'Amato, 39 F.3d 1249, 1258-59 (2d Cir. 1994)
United States v. Little, 889 F.2d 1367, 1368 (5th Cir. 1989)

* * *

"Honest services" include those fiduciary duties owed under state law by an officer, director or controlling shareholder to a corporation and its public shareholders. A controlling shareholder is an entity or individual shareholder who either owns a majority interest or exercises control over the business affairs of the corporation.

Under state law, a corporation's officers, directors and controlling shareholders owe fiduciary duties of loyalty, honesty, and good faith to the corporation which require that, when involved in a related party transaction, the best interests of the corporation and its shareholders take precedence over any interest possessed by an officer or director and not shared by the shareholders generally, and that officers and directors must act for the benefit of the corporation.

GOVERNMENT REVISED INSTRUCTION NO. 23[3]

Bomarko, Inc. v. International Telecharge, Inc., 794 A.2d 1161, 1177 (Del. Ch. 1999)

Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993)

Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)

In re Walt Disney Co. Derivative Litig., 2005 WL 2056651, *33 (Del. Ch. 2005)

Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987)

Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110, 1113-15 (Del. 1994)

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[3] Government Revised Instruction No. 23 consolidates the former Government Instructions Nos. 23 and 25.

Deutsch v. Cogan, 580 A.2d 100 (Del. Ch. 1990)
Harriman v. E.I. Du Pont de Nemours & Co., 372 F. Supp. 101, 105 (D. Del. 1974)

* * *

A "related party transaction" is a transaction in which an officer, director or controlling shareholder either appears on both sides of a transaction or receives a personal benefit not shared by all shareholders.

GOVERNMENT REVISED INSTRUCTION NO. 25

Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993)
Weinberger v. UOP, Inc., 457 A.2d 701, 710-711 (Del. 1983)
In re Walt Disney Co. Derivative Litig., 2005 WL 2056651, *33 (Del. Ch. 2005)

* * *

Not every instance of misconduct or violation of a state law fiduciary duty by a corporate officer, director or controlling shareholder constitutes a mail fraud violation. Where an officer, director or controlling shareholder misuses his official position for private gain for himself or another, then that person has defrauded the corporation and its public shareholders of his honest services, if the other elements of the mail or wire fraud offense have been met.

GOVERNMENT REVISED INSTRUCTION NO. 28

United States v. Spano, 421 F.3d 599, 602-603 (7th Cir. 2005)
United States v. Bloom, 149 F.3d 649, 656-57 (7th Cir. 1998)

United States v. Sawyer, 85 F.3d 713, 730 n.14 (1st Cir. 1996)

United States v. Warner, 02 CR 506 (Pallmeyer, J.)(modified)

United States v. Fawell, 02 CR 310 (Pallmeyer, J.)(modified)

United States v. Sorich, 05 CR 644 (Coar, J.)(modified)

APPENDIX Y

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 610 – May 1, 2007]

UNITED STATES OF AMERICA,	)	
	)	No. 05 CR 727
Plaintiff,	)	
	)	Hon. Amy J. St. Eve
v.	)	
	)	
CONRAD M. BLACK, et al.	)	

Defendants.

DEFENDANTS' JOINT OBJECTIONS TO NEW AND REVISED GOVERNMENT JURY INSTRUCTION NOS. 18, 19, 20, 21, 23, 25 AND 28 AND NEW PROPOSED DEFENDANTS' INSTRUCTION NO. 20-A

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[4]

NEW GOVERNMENT INSTRUCTION NO. 19

The information in this case charges defendants with committing mail and wire fraud in two different

ways: First, defendants are charged with mail and wire fraud for participating in a scheme to obtain money or property by means of materially false pretenses, representations, promises, or material omissions. Second, defendants are charged with mail and wire fraud for participating in a scheme to deprive Hollinger International and its public shareholders of their intangible right to the honest services of the corporation's officers, directors and/or controlling shareholders.

You are instructed that one crime can be committed in two different ways. In weighing each of the theories of mail and wire fraud charged in the Information, you must consider whether the government has proved each of the elements of mail and wire fraud beyond a reasonable doubt. You will be provided with a verdict form that directs you to consider each theory of mail or wire fraud separately.

Authority:

18 U.S.C. §§ 1341, 1343 & 1346

Defendants' Objection

Defendants object to New Government Instruction No. 19. It should not be given in this form. Instead, Defendants' New Proposed Instruction No. 20-A, submitted contemporaneously herewith, should be given. Defendants' New Proposed Jury Instruction No. 20-A combines the concepts embodied in New Government Instruction No. 19 with other concepts pertinent to the honest services scheme charged.

[12]

NEW PROPOSED DEFENDANTS' INSTRUCTION NO. 20-A

"Scheme" Defined – Need For Unanimity As To Particular Theory of "Scheme"

A scheme is a plan or course of action formed with the intent to accomplish a particular purpose. In considering whether the government has proven a scheme to defraud, it is essential that one or more of the false pretenses, representations or promises and acts charged in the portion of the Information describing the scheme be proved establishing the existence of the scheme beyond a reasonable doubt. However, the government is not required to prove all of them.

The Information charges a scheme by which the defendants intended to deceive or cheat Hollinger International and its shareholders out of money or property and to obtain that money or property for themselves, or to deprive Hollinger International and its shareholders of their intangible right to the defendants' honest services.

To establish a scheme to deprive Hollinger International and its shareholders of their right to defendants' honest services, the government must prove that the particular defendant you are considering, acting with the intent to defraud, intentionally breached his fiduciary duty for a corrupt purpose and for his own private gain. To prove that the defendant breached his fiduciary duty for "private gain," the government must prove that the particular defendant intended to and did realize some form of tangible benefit, other than job security or compensation in the regular course of employment.

A breach of a fiduciary duty does not, by itself, mean that Hollinger International and its shareholders were deprived of their right to

defendants' honest services. That is to say, even if you find beyond a reasonable doubt that an officer, director, or controlling shareholder knowingly breached or knowingly schemed to breach his fiduciary duty, that breach is not [13] enough to find that defendant guilty beyond a reasonable doubt of mail or wire fraud. You must find that any breach of a fiduciary duty was meant to achieve a corrupt purpose and was done to defraud Hollinger International and its shareholders.

If you find that the particular defendant you are considering intentionally breached his fiduciary duty, but he believed that his actions accomplished an important company objective, then you cannot find that that defendant acted with "corrupt purpose," and you cannot convict him of mail or wire fraud on an "honest services" theory.

Moreover, proof of a scheme is not enough to convict; the government must also prove the other elements of mail or wire fraud beyond a reasonable doubt all the other elements of mail or wire fraud beyond a reasonable doubt.

Finally, you cannot find that the government has proven a "scheme" unless you unanimously agree that the particular defendant you are considering engaged in one of the charged theories of mail or wire fraud submitted to you, i.e., a scheme to obtain money or property or to deprive International of the defendant's honest services.

Authority:

Seventh Circuit Committee (1999) 18 U.S.C. § 1341 & 1343 (Definition of Scheme to Defraud)(modified)

United States v. Thompson, No. 06-3676, 2007 WL 1160403, at *2, 3, 7 (7th Cir. Apr. 5, 2007)

(distinguishing between conduct that is "corrupt" (and therefore unlawful) and that which is merely "willful" (which is not necessarily unlawful), and reversing a conviction for honest services fraud where there was insufficient "private gain" and where the employee believed it was pursuing the employer's interest "as the employee understood it," stating that § 1346 is to be narrowly applied "consistent with its language" to situations where "the 'private gain' comes from third parties who suborn the employee with side payments"; Court found "unpersuasive" the argument that "an increase in official salary, or a psychic benefit such as basking in a superior's approbation ... is the sort of 'private gain' that makes an act criminal under §1341 and §1346," and held that "neither an increase in salary... nor an addition to one's peace of mind, is a 'private benefit' under §1346; Court also squarely rejected the government's argument that any "knowing violation" of rules is a "federal felony, no matter why the employee chose to bend the rules, as long as the employee gains in the process," stating that the "Rule of Lenity counsels us not to read criminal statutes for everything they can be worth.").

United States v. Walters, 997 F.2d 1219, 1227 (7th Cir. 1993) ("[W]e hold that only a scheme to obtain money or property from the victim by fraud violates § 1341. A deprivation is a necessary but not a sufficient condition of mail fraud")

[14]

United States v. Bloom, 149 F.3d 649, 654-57 (7th Cir. 1998)

United States v. Hausmann, 345 F.3d 952, 959 (7th Cir. 2003)

United States v. Brown, 459 F.3d 509, 522 (5th Cir. 2006)

United States v. Skilling, H-04-025-02, 2006 WEL 3030721, *3 (S.D. Tex. Oct. 23, 2006)

APPENDIX Z

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 723 – June 7, 2007]

UNITED STATES OF AMERICA,	)	
	)	No. 05 CR 727
v.	)	
	)	Hon. Amy J. St. Eve
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON, and MARK S. KIPNIS,	)	

GOVERNMENT'S REVISED JURY INSTRUCTIONS

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits the attached set of revised jury instructions which incorporate the Court's rulings during preliminary jury instruction conferences held on March 12, 2007, April 27, 2007 and June 1, 2007.

Respectfully submitted,
PATRICK J. FITZGERALD
United States Attorney

By: /s/ Edward N. Siskel
ERIC H. SUSSMAN
JEFFREY H. CRAMER
JULIE B. RUDER
EDWARD N. SISKIEL
Assistant United States
Attorneys
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5300

Dated: June 7, 2007

* * * * *

INSTRUCTIONS REGARDING

MAIL AND WIRE FRAUD (18 U.S.C. §§ 1341, 1343, and 1346)

FOR COUNTS ONE THROUGH TWELVE

All of the Defendants are charged with mail fraud in Counts One, Five, Six, Seven and Nine, and with wire fraud in Count Eight. Defendant Kipnis is charged individually with mail fraud in Count Two and wire fraud in Counts Three and Four. Defendants Black and Boultbee are charged with wire fraud in Counts Ten, Eleven and Twelve.

To sustain each charge of mail or wire fraud, the government must prove the following propositions:

First, that the Defendant knowingly devised or participated in a scheme to defraud, or to obtain money or property by means of materially false pretenses, representations, or promises, as described in the Information;

Second, that the Defendant did so knowingly and with the intent to defraud; and

Third, that for the purpose of carrying out the scheme or attempting to do so, the Defendants in the mail fraud counts used or caused the use of the United States mails, or a private or commercial interstate carrier in the manner charged in the particular count, and the Defendants in the wire fraud counts caused the use of an interstate wire communication in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to a particular Defendant, then you should find that Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt as to a particular Defendant, then you should find that Defendant not guilty.

GOVERNMENT REVISED INSTRUCTION NO. 18

* * *

The Information charges Defendants with committing mail and wire fraud in two different ways: First, Defendants are charged with mail and wire fraud for participating in a scheme to obtain money or property by means of materially false pretenses, representations, or promises. Second, Defendants are charged with mail and wire fraud for participating in a scheme to deprive Hollinger International and its public shareholders of their intangible right to the honest services of the

corporation's officers, directors and/or controlling shareholders.

A scheme is a plan or course of action formed with the intent to accomplish a particular purpose. A scheme to defraud is a scheme that is intended to deceive or cheat a person or entity and to obtain money or property and cause the potential loss of money or property to a person or an entity, or to deprive Hollinger and its shareholders of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger International. In order to deprive Hollinger International and its public shareholders of their intangible right to Defendants' honest services, the government must prove that the particular Defendant you are considering misused his position for private gain for himself and/or a co-schemer. "Private gain" does not include job security or compensation in the regular course of employment through above-board channels.

COURT REVISED INSTRUCTION NO. 20

* * *

A breach of a fiduciary duty owed by an officer, director or controlling shareholder under state law does not in and of itself amount to a violation of the mail or wire fraud statute. That is to say, even if you find beyond a reasonable doubt that an officer, director or controlling shareholder knowingly breached or knowingly schemed to breach his or her fiduciary duty, you must still determine whether the government has proven all of the elements of the crime charged beyond a reasonable doubt.

GOVERNMENT INSTRUCTION NO. 29

* * *

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat Hollinger International and its public shareholders in order to cause a gain of money or property to the Defendants or others, and the potential loss of money or property to another, or to deprive the corporation and its public shareholders of their right to the honest services of their corporate officers.

GOVERNMENT REVISED INSTRUCTION NO. 30

* * *

Good faith on the part of a defendant is inconsistent with an intent to defraud, an essential element of the charge. The burden is not on the defendant to prove his good faith; rather, the government must prove beyond a reasonable doubt that the defendant acted with intent to defraud.

DEFENDANTS' INSTRUCTION NO. 30-B

* * *

The mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime. The scheme to defraud need not have succeeded for the mail or wire fraud statute to be violated.

GOVERNMENT REVISED INSTRUCTION NO. 32

* * *

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrued to his co-schemers, as long as the government has proved the other elements of mail or wire fraud beyond a reasonable doubt.

GOVERNMENT REVISED INSTRUCTION NO. 33

A Defendant's association with alleged co-schemers or persons alleged to be members of an enterprise is not by itself sufficient to prove his participation or membership in a scheme or enterprise.

If a Defendant performed acts that advanced or assisted a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish a Defendant's guilt.

DEFENDANTS' REVISED INSTRUCTION NO. 38

* * *

As to the mail fraud counts, the government must prove that the United States mails or a private or commercial interstate carrier were used to carry out the scheme, or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States mails or a private or commercial interstate carrier, a Defendant need not actually intend that use to take place. You must find that the Defendant knew this use would actually occur, or that the Defendant knew that it would occur in the ordinary course of business, or that the Defendant knew facts from which that use could reasonably have been foreseen. However, the government does not have to prove that a Defendant knew that the carrier was an interstate carrier.

The Defendant need not actually or personally use the mail or an interstate carrier. Although an item mailed or sent by interstate carrier need not by itself contain a fraudulent representation or promise

or request for money, it must further or attempt to further the scheme.

Each separate use of the mail or an interstate carrier in furtherance of the scheme to defraud constitutes a separate offense.

GOVERNMENT INSTRUCTION NO. 38

* * *

As to the wire fraud counts, the government must prove that interstate communication facilities were used to carry out the scheme, or were incidental to an essential part of the scheme.

In order to cause interstate wire communications to take place, a Defendant need not actually intend that use to take place. You must find that the Defendant knew this use would actually occur, or that the Defendant knew that it would occur in the ordinary course of business, or that the Defendant knew facts from which that use could reasonably have been foreseen. However, the government does not have to prove that a Defendant knew that the wire communication was of an interstate nature.

The Defendant need not actually or personally use the interstate communication facilities.

Although an item communicated interstate need not by itself contain a fraudulent representation or promise or request for money, it must further or attempt to further the scheme.

Each separate use of interstate communication facilities in furtherance of the scheme to defraud constitutes a separate offense.

GOVERNMENT INSTRUCTION NO. 40

The following types of transmissions constitute transmissions by means of wire communication in interstate commerce within the meaning of the wire fraud statute: e-mails, faxes, filing of public documents by wire, and electronic money transfers.

GOVERNMENT INSTRUCTION NO. 41

* * * * *

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

Government's Revised Jury Instructions

was served on June 7, 2007, in accordance with FED. R. CRIM. P. 5, LR 5.5, and the General Order on Electronic Filing (ECF) pursuant to the district court's system as to ECF filers.

/s/ Edward N. Siskel

EDWARD N. SISKEL
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois
(312) 353-3500

APPENDIX AA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 05 CR 727
Plaintiff,	)	
v.	)	
CONRAD M. BLACK, JOHN A. BOULTBEE, PETER Y. ATKINSON AND MARK S. KIPNIS,	)	Chicago, Illinois June 27, 2007 9:00 o'clock a.m.
Defendants.	)	

VOLUME SIXTY-FOUR
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE AMY J. ST. EVE,
AND A JURY

* * * * * * * * * * *

[15166]

All of the defendants are charged with mail fraud in Counts 1, 5, 6, 7 and 9, and with wire fraud in Count 8.

Defendant Kipnis is charged individually with mail fraud in Count 2 and wire fraud in Counts 3 and 4. Defendant Black -- defendants Black and Boultbee are charged with wire fraud in Counts 10, 11 and 12.

To sustain each charge of mail or wire fraud, the government must prove the following propositions:

First, that the defendant knowingly devised or [15167] participated in a scheme to defraud or to obtain money or property by means of materially false pretenses, representations or promises, as described in the Information.

Second, that the defendant did so knowingly and with the intent to defraud.

And, third, that for the purpose of carrying out the scheme or attempting to do so, the defendants in the mail fraud counts used or caused the use of the United States mails or a private or commercial interstate carrier in the manner charged in the particular count; and, that the defendants in the wire fraud counts caused the use of an interstate wire communication in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to a particular defendant and a particular count, then you should find that defendant guilty as to that count.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt as to a particular defendant and a

particular count, then you should find that defendant not guilty of that count.

The Information charges defendants with committing mail and wire fraud in two different ways.

First, defendants are charged with mail and wire [15168] fraud for participating in a scheme to obtain money or property by means of materially false pretenses, representations or promises.

Second, defendants are charged with mail and wire fraud for participating in a scheme to deprive Hollinger International and its public shareholders of their intangible right to the honest services of the corporation's officers, directors and/or controlling shareholders.

A scheme is a plan or course of action formed with the intent to accomplish a particular purpose. A scheme to defraud is a scheme that is intended to deceive or cheat a person or entity and to obtain money or property and caused the potential loss of money or property to a person or an entity; or, to deprive Hollinger International and its shareholders of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger International.

In order to deprive Hollinger International and its public shareholders of their intangible right to defendants' honest services, the government must prove that the particular defendant you are considering misused his position for private gain for himself and/or a co-schemer.

Private gain does not include job security or compensation in the regular course of employment through above-board channels.

[15169] In considering whether a defendant has engaged in a scheme to defraud another of a right to the defendant's honest services, you must first find that the defendant owed that other person or entity a fiduciary duty.

Honest services include those fiduciary duties owed under Delaware law by an officer, director or controlling shareholder to a corporation and its public shareholders.

A controlling shareholder is an entity or individual shareholder who directly or indirectly either owns a majority interest in the corporation or who exercises control over the business affairs of the corporation.

Under Delaware law, a corporation's officers, directors and controlling shareholders owe a fiduciary duty of loyalty to the corporation and its public shareholders.

The duty of loyalty requires that the directors, officers and controlling shareholders of a corporation act in the corporation's best interests; and, that they refrain from taking actions that either conflict with the corporation's interests or that harm the corporation.

Before you can find that a defendant has deprived Hollinger International and its public shareholders of his honest services, you must find that the defendant knowingly and intentionally breached his duty of loyalty.

If the transaction at issue is entirely fair to the corporation, then the government has not proven a breach of [15170] the duty of loyalty.

In considering whether a particular transaction is entirely fair to the corporation, you should consider two basic aspects: Fair dealing and fair price.

Fair dealing requires a fair process. Fair dealing considers whether the transaction was timed -- I'm sorry, fair dealing considers when the transaction was timed -- how it was initiated, structured and negotiated; whether or how the transaction was disclosed to the directors; and, whether or how the approvals of the directors were obtained.

Fair price requires that the transaction was substantively fair by examining the economic and financial considerations of it. You must consider both aspects of entire fairness.

If the material facts concerning a director's, officer's or controlling shareholder's interest in a particular transaction were disclosed to or known by the independent directors on the Board of Directors or the Audit Committee when the Board or committee approved or ratified the transaction, or the transaction was entirely fair to the corporation and its public shareholders, then that director, officer or controlling shareholder has not breached his duty of loyalty to the corporation.

A Board of Directors or Audit Committee can ratify a prior unauthorized transaction. Ratification has the same [15171] effect as approval. In order for such ratification to be valid, the Board of Directors or Audit Committee must have acted on complete disclosure of the material facts and circumstances surrounding the transaction. A subsequent ratification relates back to the

transaction as of the date when the transaction occurred.

Materiality is an element of the offense of mail and wire fraud. A misrepresentation or omission is material if it has a natural tendency to influence or is capable of influencing the decision of the decision-making body to which it was addressed.

A breach of fiduciary duty owed by an officer, director or controlling shareholder under Delaware law does not, in and of itself, amount to a violation of the mail or wire fraud statute. That is to say, even if you find beyond a reasonable doubt that an officer, director or controlling shareholder knowingly breached or knowingly schemed to breach his or her fiduciary duty, you must still determine whether the government has proven all of the elements of the crime charged beyond a reasonable doubt.

You have heard evidence in this case regarding the disclosures of non-competition payments in Hollinger International's quarterly and annual reports and proxy statements in 2001 and 2002. The defendants in this case are not charged with securities fraud.

[15172] The phrase "intent to defraud" means that the acts charged were done knowingly, with the intent to deceive or cheat Hollinger International and its public shareholders, in order to cause a gain of money or property to the defendants or others; and the potential loss of money or property to another; or, to deprive the corporation and its shareholders of their right to the honest services of their corporate officers.

Good faith on the part of a defendant is inconsistent with an intent to defraud, an essential element of the charge. The burden is not on the defendant to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with intent to defraud.

The mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime. The scheme to defraud need not have succeeded for the mail or wire fraud statute to be violated.

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrued to his co-schemers, as long as the government has proved the other elements of mail or wire fraud beyond a reasonable doubt.

A defendant's association with his alleged co-schemers or persons alleged to be members of an enterprise is not, by itself, sufficient to prove his participation or [15173] membership in a scheme or enterprise.

If a defendant performed acts that advanced or assisted a criminal activity, but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish a defendant's guilt.

As to the mail fraud counts, the government must prove that the United States mails or a private or commercial interstate carrier were used to carry out the scheme or were incidental to an essential part of the scheme.

In order to use or cause the use of the United States mails or a private or commercial interstate carrier, a defendant need not actually

intend that use to take place. You must find that the defendant knew this would actually occur; or, that the defendant knew that it would occur in the ordinary course of business; or, that the defendant knew facts from which that use could reasonably have been foreseen.

However, the government does not have to prove that a defendant knew that the interstate -- that the carrier was an interstate carrier.

The defendant need not actually or personally use the mail or interstate carrier.

Although an item mailed or sent by interstate carrier need not, by itself, contain a fraudulent representation or promise or request for money, it must further or attempt to [15174] further the scheme. Each separate use of the mail or an interstate carrier in furtherance of the scheme to defraud constitutes a separate offense.

As to the wire fraud counts, the government must prove that interstate communication facilities were used to carry out the scheme or were incidental to an essential part of the scheme. In order to cause interstate wire communications to take place, a defendant need not actually intend that use to take place.

You must find that the defendant knew this use would actually occur; or, that the defendant knew that it would occur in the ordinary course of business; or, that the defendant knew facts from which that use could reasonably have been foreseen.

However, the government does not have to prove that a defendant knew that the wire communication was of an interstate nature.

The defendant need not actually or personally use the interstate communication facilities. Although an item communicated interstate need not, by itself, contain a fraudulent representation or promise or request for money, it must further or attempt to further the scheme.

Each separate use of interstate communication facilities in furtherance of the scheme to defraud constitutes a separate offense.

[15175] The following types of transactions constitute transmissions by means of wire communication in interstate commerce within the meaning of the wire fraud statute: E-mails, faxes, filing of public documents by wire and electronic money transfers.

This instruction applies to your consideration of Counts 10 and 11: Regulations in effect between 2000 and 2002 regarding disclosures in proxy statements filed with the SEC from 2000 to 2002 require disclosures of perquisites or other personal benefits, securities or properties not categorized as salary or bonus.

Unless the aggregate amount of the perquisite, personal benefit, securities or properties is less than the lesser of either $50,000 or 10 percent of the total of annual salary and bonus reported for the named executive officer.

For purposes of disclosures in a proxy statement, perquisites and other personal benefits are valued on the basis of the aggregate incremental cost to the reporting corporation and its subsidiaries during the one-year period. This means that the value of a perquisite or other personal benefit is

computed solely on the basis of the actual additional cost to the corporation.

This instruction relates to your consideration of counts 10 and 11: A fact or omission is material if there is a substantial likelihood that a reasonable investor would **[15176]** consider the fact or omission significant or important in deciding whether to buy, sell or hold securities.

In other words, there must be a substantial likelihood that the fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.

Instructions regarding concealing documents from an official proceeding for Count 13.

Defendant Black is charged individually with concealing documents from an official proceeding in Count 13. To sustain the charge of concealing documents from an official proceeding, as charged in Count 13 of the Information, the government must prove the following propositions:

First, on or about May 20th, 2005, the defendant corruptly concealed or attempted to conceal records, documents or other objects; and, second, the defendant did so with the intent to impair the availability of the records, documents or other objects in an official proceeding.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find defendant Black guilty as to Count 13.

If, on the other hand, you find from your consideration of all the evidence that anyone of these propositions has not been proved beyond a

reasonable doubt, [15177] then you should find defendant Black not guilty of Count 13.

The term "corruptly" means having an improper purpose; an intent to subvert or undermine the fact-finding ability of an official proceeding is an improper purpose.

The term "official proceeding" includes a proceeding before a judge or court of the United States; a proceeding before a federal grand jury; or, a proceeding before a federal government agency, which is authorized by law.

The United States Securities and Exchange commission -- the SEC -- is a federal government agency which is authorized by law.

Neither an investigation by the United States Attorney's office nor any Canadian court proceeding, nor any internal corporate document retention policy constitutes an official proceeding.

An official proceeding need not be pending or about to be instituted at the time of the offense. An official proceeding, however, must have been reasonably foreseeable to the defendant.

The government bears the burden of proving beyond a reasonable doubt that the official proceeding was reasonably foreseeable to the defendant.

There are three official proceedings identified in Count 13: One, an SEC proceeding against defendant Black; two, a criminal investigation of defendant Black by a federal page [15178] grand jury; and, three, a pending criminal proceeding against defendant Black before the United States District Court.

To find defendant Black guilty of Count 13, the government does not need to prove beyond a reasonable doubt that Black intended to impair the availability of the records, documents or other objects in all three official proceedings.

Instead, the government must prove beyond a reasonable doubt that defendant Black intended to impair the availability of the records, documents or other objects in at least one of those official proceedings.

However, you must unanimously agree on which of the official proceedings, if any, Black intended to obstruct.

Instructions regarding racketeering for Count 14.

Defendant Black is charged individually with racketeering in Count 14. To prove defendant Black guilty of racketeering as charged in Count 14, the government must prove the following propositions:

First, that there was an association in fact enterprise, the Hollinger enterprise, comprised of Conrad Black, David Radler, John Boultbee, Peter Atkinson, Mark Kipnis and the Ravelston Group, Inc.

Second, that defendant Black was associated with the Hollinger enterprise.

Third, that defendant Black knowingly conducted or participated in the conduct of the affairs of the Hollinger [15179] enterprise through a pattern of racketeering activity as described in Count 14.

Fourth, that the activities of the Hollinger enterprise affected interstate commerce.

And, fifth, that the commission of at least one of the racketeering acts described in Count 14 occurred on or after November 17th, 2000.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find defendant Black guilty as to Count 14.

If, on the other hand, you find from your consideration from all the evidence anyone of these propositions has not been proved beyond a reasonable doubt, then you should find defendant Black not guilty of Count 14.

In order to find a pattern of racketeering activity for purposes of Count 14, you must find beyond a reasonable doubt that defendant Black committed or caused another person to commit at least two racketeering acts described in Count 14; and, that those acts were in some way related to each other; and, that there was continuity between them and that they were separate acts.

Although a pattern of racketeering activity must consist of two or more acts, deciding that two such acts were committed by itself may not be enough for you to find that a [15180] pattern exists.

Acts are related to each other if they are not isolated events; that is, if they have the same -- if they have similar purposes or results or participants or victims or are committed a similar way or have other similar distinguishing characteristics or are part of the affairs of the same enterprise.

There is continuity between acts if, for example, they are ongoing over a substantial period; or, they are part of the regular way some entity does business or conducts its affairs. The government need not prove that all of the acts described in Count 14 were committed, but you must unanimously agree as to which two or more racketeering acts defendant Black committed or caused to be committed, in order to find defendant guilty of that count.

The term "enterprise" can include a group of people or legal entities associated together for a common purpose of engaging in a course of conduct. This group may be associated together for purposes that are both legal and illegal.

In considering whether a group is an enterprise, you should consider whether it has an ongoing organization or structure; either formal or informal; and, whether the various members of the group functioned as a continuing unit.

A group may continue to be an enterprise even if it changes membership by gaining or losing members over time.

* * * * *

APPENDIX BB

Kipnis, Mark S.

From: Atkinson, Peter
Sent: Sunday, February 17, 2002 11:47 AM
To: 'DSukonick@torys.com'; Atkinson, Peter
Cc: 'BDeMerchanttorys@torys.com'; 'abeck@torys.com'; Kipnis, Mark S.
Subject: Re: U.S. Sale Non-Comp. Payments

Darren, I am sure you are right yet I wonder why we did not disclose them in the 10Q last year. Having gone through all the angst we did last year, I wonder if we had a basis for not disclosing or were they simply overlooked, ie we did not tell you about them. Does Beth or Andy or Mark have any recollection? I suspect the disclosure as currently drafted could raise criticism but if we are obliged to include it in our circulars we will simply have to deal with it.

Peter

Atkinson Exh. Torys 35

APPENDIX CC

Sukonick, Darren

From: Atkinson, Peter
[PAtkinson@hollinger.com]
Sent: February 19, 2002, 11:59 AM
To: 'dsukonicki@torys.com'
Subject: Fw: RE: U.S. Sale Non-Comp. Payments

Darren. As I am trying to take some time off could you please deal directly with Jack with cc to me. I will tell Charlie we won't be able to includ this in the draft proxy he wants to send to directors today. Thanks. Peter

---Original Message---
From: Boultbee, Jack <JBoultbee@Hollingerinc.com>
To: Atkinson, Peter <PAtkinson@hollinger.com>
Sent: Tue Feb 19 11:46:09 2002
Subject: RE: U.S. Sale Non-Comp. Payments

Peter

This doesn't include the Canwest amount. I have trouble disclosing only some of the payments. What is the rationale for excluding these? In a related matter the auditors are pushing for note disclosure of the amounts also. This is on the basis that, in their view, these are related party transctions. I think that their definition of "related" could be argued since really only Conrad is related. I thjink they are trying to say that all officers are related. In any event, they will accept a note that tells the agregate amount paid

and says that it was paid to certain officers and to Ravelston without naming anyone. Is it possible to bring the people around to that same type of wording for the Canadian proxy circular? Do you think that I should push them only to disclose Conrad's part in the notes to the financial statements? Jack

---Original Message---
From: Atkinson, Peter
Sent: Sunday, February 17, 2002 2:46 PM
To: Boultbee, Jack
Subject: Fw. U.S. Sale Non-Comp. Payments

Jack. We are into another disclosure issue with regard to the non competes paid on the sale of the community papers. I believe we have to make the suggested disclosure in hlg and hlr circulars. Do you have any comment? Peter

-----Original Message---
From: DSukonick@torys.com
<DSukonick@torys.com>
To: patkinson@hollingerinc.com
<PAtkinson@hollinger.com>
CC: BDeMerchant@torys.com
<BDeMerchant@torys.com>; abeck@torys.com
<abeck@torys.com>
Sent: Sun Feb 17 11:57:22 2002
Subject: U.S. Sale Non-Payments

Peter, you asked for a brief note summarizing our view on the non-competition payments related to the U.S. asset sales (the "U.S. sale non-comp. payments"). These types of related party payments are required to be disclosed in accordance with specific form requirements which require the disclosure to be in the proxy statement. As far as I am aware (based on a review of the HII 2001 proxy statement and 2001Q1 10-Q and HI 2001 proxy

circular and 2001 AIF), the U.S. sale non-comp. payments have never been disclosed. Although the 2001 amounts, on their own, may not be considered by management to be material, taken together with undisclosed 2000 amounts, they are likely material (and certainly more material than the similar Osprey payments).

It would be prudent for both HI and HII to disclose all of the previously undisclosed non-comp. payments in the 2002 proxy materials (i.e., Osprey payments and U.S. sale non-comp. payments in 2000 and 2001). We could considering aggregating the 2001 and 2000 amounts as follows (based on a theory that the total amounts were only fixed and finalized in 2001):

In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, Lord Black and Messrs. Boultbee, Radler and. Atkinson entered into non-competition agreements with the purchasers pursuant to which each agreed not to compete directly or indirectly in the United States with the United States businesses sold to the purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 and 2000 of $15,600,000, consisting of $7,197,500 paid to Lord Black, $7,197,500 paid to paid to Mr. Radler, $602,500 paid to Mr. Boultbee and $602,500 paid to Mr. Atkinson.

Please contact me if you want to discuss this further.

Darren E. Sukonick

Torys LLP
Tel: 416.865.8195
Fax: 416.865.7380
mailto: dsukonick@torys.com
www.torys.com

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Atkinson Exh. Torys 38

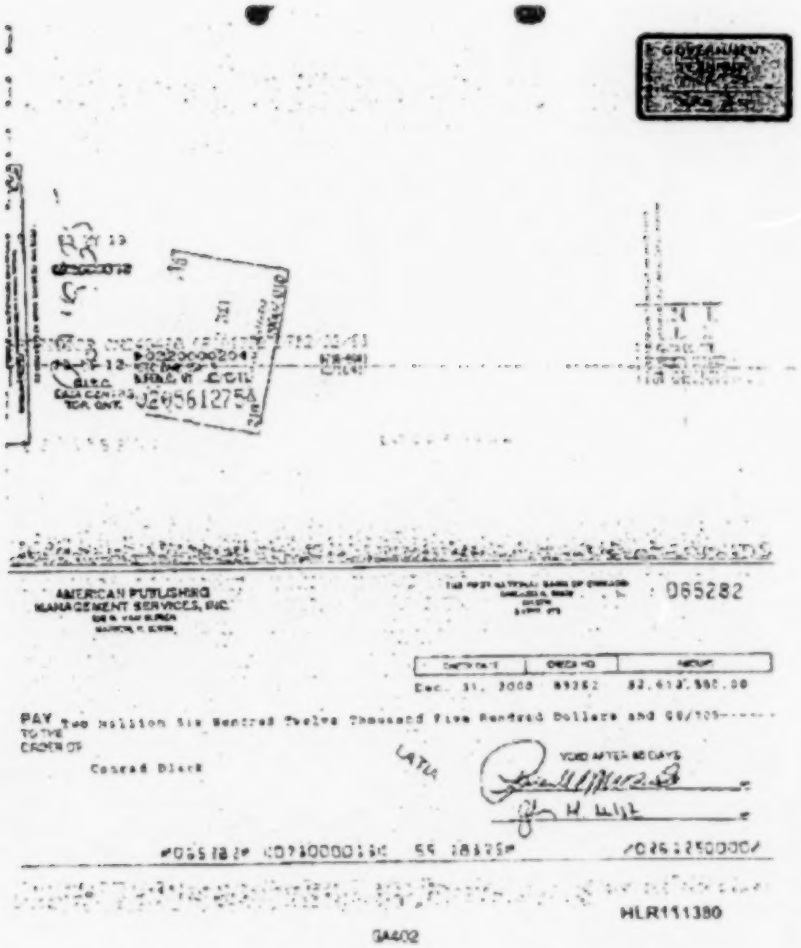
APPENDIX DD

From: Atkinson, Peter
Sent: Tuesday, February 19, 2002 11:56 AM
To: Boultbee, Jack
Cc: 'dsukonick@torys.com'
Subject: RE: U.S. Sale Non-Comp. Payments

Jack. The CW payments were disclosed in last years 10Q. The rationale for not disclosing them is that they were paid in 2000. But on all of your points I think we need help from Torys who may have to discuss the issues with the Auditors. So I will copy Darran with this and send him your email with the request that he respond to both of us. Peter

Atkinson Exh. Torys 39

APPENDIX EE



Govt. Exh. APC 9

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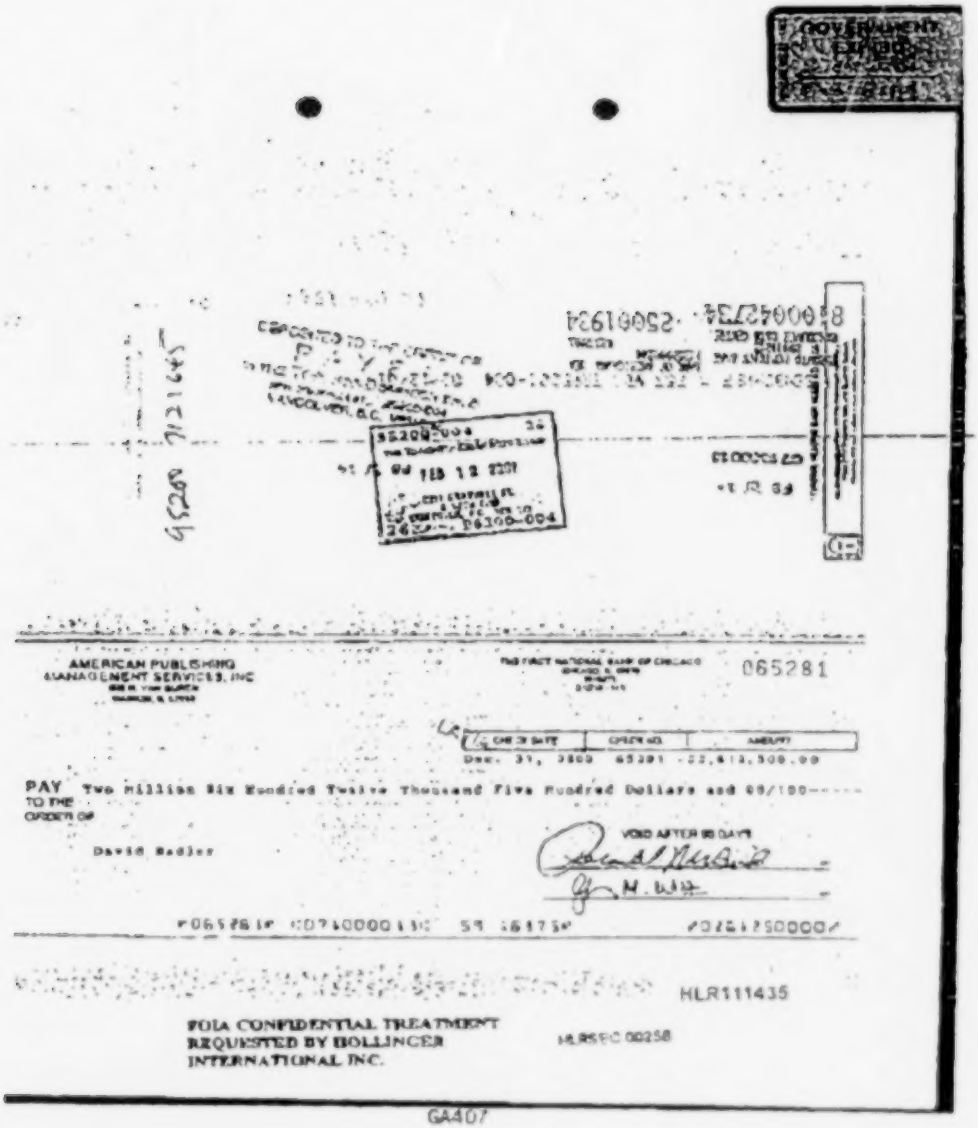
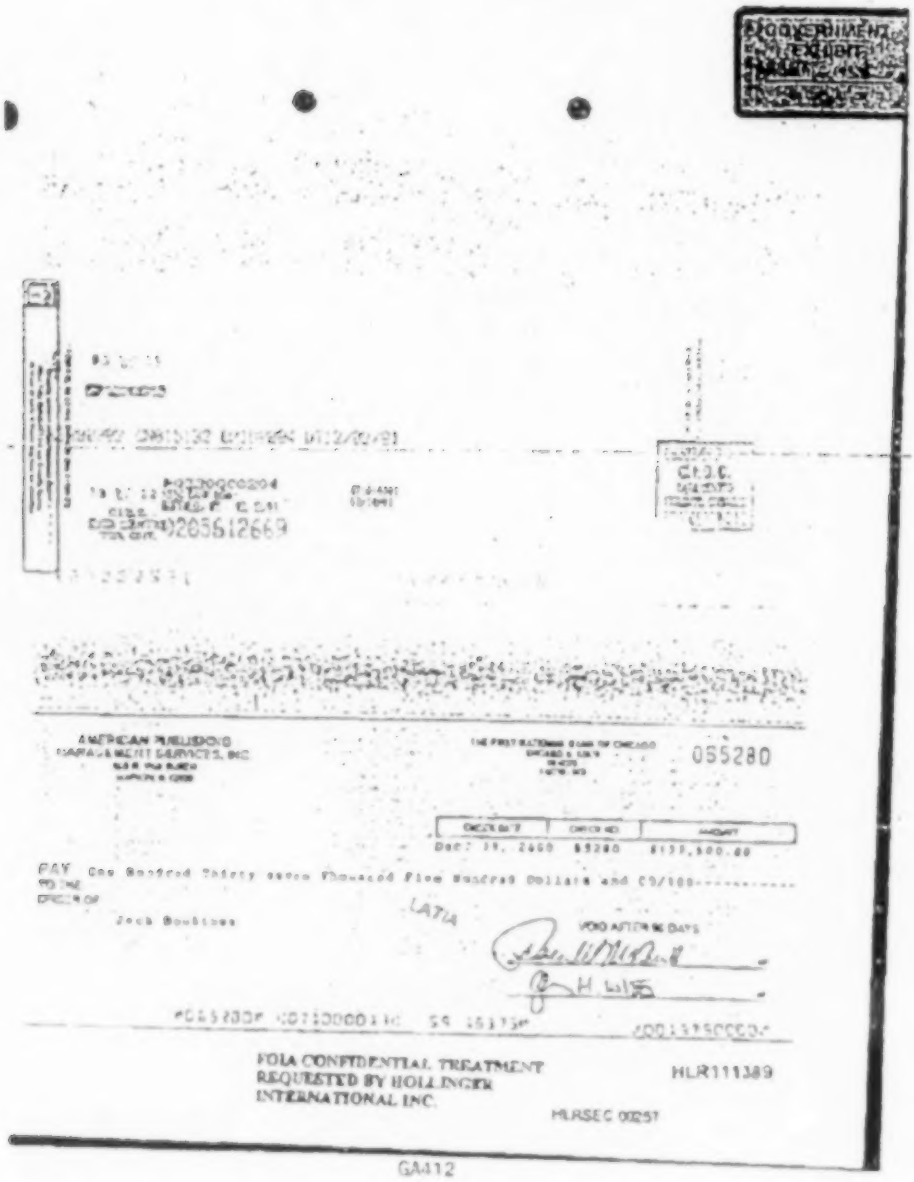
APPENDIX FF



Govt. Exh. APC 12

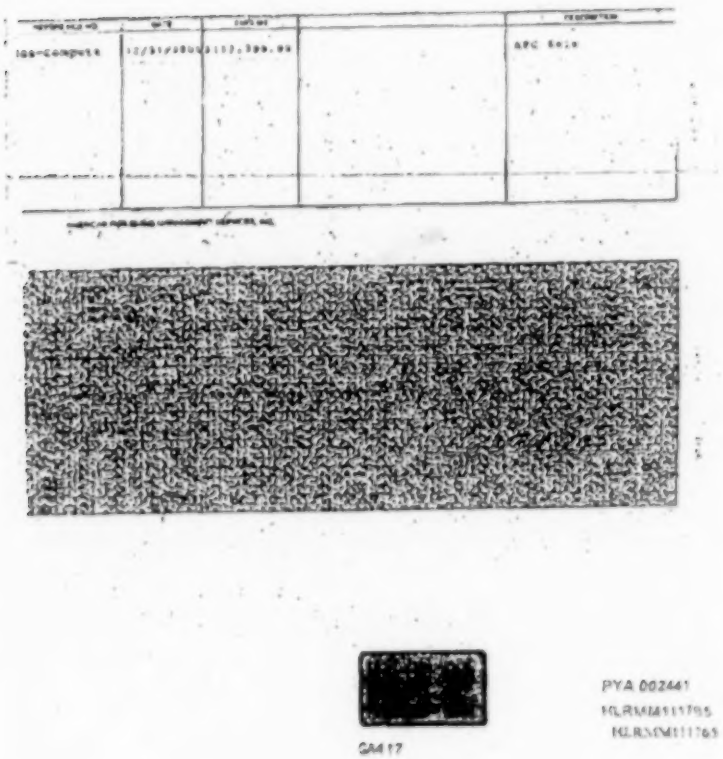
APPENDIX GG



GA412

Govt. Exh. APC 14

APPENDIX HH



Govt. Exh. APC 16

APPENDIX II

HOLLINGER INTERNATIONAL INC.
HOLLINGER INTERNATIONAL PUBLISHING INC.
JOINT BOARD OF DIRECTORS MEETING
DECEMBER 4, 2000

MEETING MINUTES

A joint regular meeting of the Board of Directors (the "Board") of Hollinger International Inc. (the "Company") and Hollinger. International Publishing Inc. ("Publishing") was held Monday, December 4, 2000, at the offices of the Company, 712 Fifth Avenue, 18th Floor, New York, New York. Board members present were Dwayne O. Andreas (via telephone), Barbara Amiel Black, Conrad M. Black, Richard R. Burt, Raymond G. Chambers (via telephone), Daniel W. Colson, Henry A. Kissinger, Marie-Josée Kravis (via telephone), Shmuel Meitar, Richard N. Perle, F. David Radler, Robert S. Strauss (via telephone), A. Alfred Taubman, James R. Thompson and Lord Weidenfeld. Leslie H.. Wexner was absent. Peter Y. Atkinson, J.A. Boultbee, Paul B. Healy, Mark S. Kipnis, Linda Loye and Robert Smith were present at the invitation of the Chairman. The meeting was called to order at 11:00 a.m. Eastern time. Mr. Black acted as Chairman of the meeting and Mr. Kipnis acted as Secretary.

Matters discussed and considered in connection with the Company were as follows:

I. REPORT ON OPERATIONS - ACQUISITIONS, DISPOSITIONS AND INVESTMENTS

Mr. Black commenced the meeting with a brief summary of the concluded CanWest disposition. CanWest is receiving very solid assets. The transaction is an evolutionary change for the Company. We now have minimal debt other than our public notes, and a myriad of options, including new acquisition possibilities and repurchasing shares in the open market. We will continue to divest our remaining Canadian papers. The *Telegraph* has had its best year ever. The *National Post*'s circulation is 90 percent of the *Globe and Mail* and growing. The *National Post* has had a huge impact on Canada. We expect the *National Post* to virtually break even in the fourth quarter of this year and have a reduced budgeted loss of $6 million in 2001. A discussion ensued.

Mr. Colson reported on U.K. operations. We were one of at least five bidders for the Express Group of newspapers. We were a strategic bidder as we did not want the *Daily Mail* to own both the middle market newspapers in the U.K. The winning bidder has a very questionable business reputation and is principally a publisher of pornographic magazines. We are co-owners of the London printing plant with Express; the recent sale triggers our right to buy the other 50 percent. We expect difficulties in exercising our right to purchase the Express' 50 percent as the formula in the joint venture agreement for

establishing the purchase price does not deal clearly with the

HLR 005450

question of assets acquired by the joint venture company since the joint venture was established. Meanwhile, the Express Group has already missed a large payment in connection with a joint venture we also have with the Express Group for newsprint buying. The Telegraph is on track for its best year ever. 2000 will be the first year we achieve an EBITDA of US$100 million. EBITDA for the first 10 months is £62 million, approximately 42 percent above budget. Advertising revenue has increased approximately £25 million this year to £215 million. We are maintaining our circulation lead of 300,000 over *The Times* during the week and 400,000 on Saturdays. Sunday circulation is still 400,000 behind *The Sunday Times*. Circulation revenue is on budget. Mr. Colson believes being in the eighth year of a cover price war will make it difficult to contemplate a cover price increase, but management is proposing one on Saturdays because of our strong market position. During the past year or two, *The Times* started a subscription program similar to The Telegraph's and now has approximately 100,000 subscribers compared to our 300,000. However, they appear to have largely cannibalized their own circulation as their overall circulation has not increased. The *Electronic Telegraph* currently has 25.5 million hits per month. Handbag.com, our

joint venture with Boots, now has 5 million hits per month from 350,000 users. It is the leading women's portal in the U.K. We still have approximately a 30 percent stake in Interactive Investors. Its current market cap is approximately S75 million. Mr. Colson believes III has a fundamental problem with its business model. It has great traffic but insufficient revenue generation capabilities. *The Spectator's* latest ABC circulation of 59,800 is an all-time high, notwithstanding a reduction in bulk sales. There are now more than 33,000 subscribers. We are expecting an operating profit of £880,000, an increase of 48 percent. A discussion ensued.

HLR 005451

Mr. Radler reported on U.S. operations. During the month of December, the Chicago Group will complete the acquisition of the Copley Group of newspapers known as the Fox Valley Press. We are buying papers generating $86 million in sales and $3.5 million of EBITDA. We believe we can dramatically increase EBITDA. The papers consist of four dailies, one tri-weekly and 11 weeklies. When combined with our current Chicago Group papers, we will have total circulation of 1.975 million in the greater Chicago metropolitan area. The new Sun-Times plant has five of its six presses operational. We are actually building the presses ourselves. A seventh press will probably be needed. Costs relating to overtime, excessive staff, waste and additional equipment costs are being

addressed; however, a major continuing cost arises from the presses' current inability to zone advertising. We will probably not be able to effectively zone until the end of March. National advertising is up 18 percent. Retail is down 3.5 percent and classified down 1 percent. Mr. Radler further noted that the Canadian sale has "clawback" provisions on both sides based upon meeting 2000 targeted earnings. Our 2000 EBITDA requirement is approximately $398 million. Through October we are approximately $300,000 above budget. A discussion ensued.

II. REPORT ON FINANCE

Mr. Boultbee reviewed third quarter results and the effect of the CanWest transaction. Third quarter revenue was up 3.7 percent ($18.3 million). Third quarter-EBITDA was up 42 percent ($20.6 million). The *National Post* has shown significant improvement, with revenue up 31 percent and EBITDA up 34 percent, all versus third quarter 1999. Interest expense was up 21.1 percent. Mr. Boultbee next analyzed earnings from comparable operations and showed the impact from internet activities. Mr. Boultbee next reviewed the financial aspects of the CanWest transaction, as originally signed on July 30, 2000 and as amended on November 8, 2000. The amendment did not change any valuations, but certain properties were removed from the sale. Funds were used primarily to pay bank 'debt. The residual cash after estimated expenses of sale is approximately $90 million. All future sales of

Canadian properties should fall to residual cash. A discussion ensued.

III. ADOPTION OF RESOLUTIONS

The following resolutions attached hereto in their entirety as Exhibit A were presented by Mr. Black to the Board for its consideration: (i) approval and adoption of the minutes of the September 11, 2000 Board meeting; (ii) approval of the following dividends: declaration of a March 1, 2001 dividend of $2.577 per each share of the Company's Series C Convertible Preferred Stock; declaration of a January 15, 2001 dividend of approximately $0.96 per each share of the Company's Series E Convertible Preferred Stock; and declaration of a January 15, 2001 dividend of $0.1375 per each share of the Company's Common Stock (both Class A and Class B); (iii) confirmation and ratification of actions taken by the Executive Committee since the last Board meeting; and (iv) general authorization for implementation of the foregoing resolutions.

The Board reviewed the resolutions attached hereto as Exhibit A, and upon motion duly made and seconded, the resolutions were unanimously approved and adopted by the Board.

It was ordered that a copy of Exhibit A be attached to the minutes of the meeting and signed by the Secretary for identification.

IV. MISCELLANEOUS

A general discussion ensued. The next meeting of the Board of Directors is

tentatively scheduled for Tuesday, February 27, 2001. Notice of the actual meeting date will be forwarded to all Board members.

HLR 005452

There being no further business brought before the Board, the meeting was formally adjourned at 12:35 p.m. Eastern time.

/S/
Mark S. Kipnis
Secretary of the Meeting

HLR 005453

SIGNED BY THE SECRETARY
FOR IDENTIFICATION

/S/_____

EXHIBIT A

EXHIBIT A HOLLINGER INTERNATIONAL INC.

Joint Board of Directors Meeting
December 4, 2000

ADOPTED RESOLUTIONS

1. APPROVAL OF MINUTES OF THE SEPTEMBER 11, 2000 BOARD MEETING.

   WHEREAS, at the meeting of the Board of Directors held on September 11, 2000, pursuant to the Chairman's request, the Vice President of the Company, Mark S. Kipnis, acted as Secretary of the meeting;

   WHEREAS, the Secretary of the meeting caused to be prepared formal minutes of the meeting, copies of which have been distributed to the members of the Board of Directors;

   WHEREAS, the Board of Directors has reviewed these minutes and believes that the minutes accurately reflect the September 11, 2000 Board meeting;

   NOW, THEREFORE, BE IT RESOLVED, that the minutes of the September 11, 2000 board meeting are hereby formally approved and adopted by the Board of Directors and shall be signed by the Secretary of the 'meeting for identification and inserted into the Company's minute book.

2. DECLARATION OF DIVIDENDS.

Declaration of Dividend on Series C Preferred Stock

WHEREAS, pursuant to the Certificate of Designation of the Company's Series C Convertible Preferred Stock (the "Series C Preferred Stock"), the Company is authorized to pay dividends cumulative from the date of issuance of the Series C Preferred Stock at the rate of 9.50% per annum of the stated Liquidation Amount per share (equivalent to $10.30845 per annum) in arrears on the first day of March, June, September and December;

WHEREAS, the Board of Directors desires to declare a $2.577 per share cash dividend on each of the issued and outstanding shares of Series C Preferred Stock of the Company payable on March 1, 2001, to stockholders of record on February 25, 2001.

NOW, THEREFORE, BE IT RESOLVED, that a $2.577 per share cash dividend on each of the Company's issued and outstanding shares of Series C Preferred Stock, payable on March 1, 2001 to stockholders of record on February 25, 2001, is hereby declared.

HLR 005454

Declaration of Dividend on Series E Preferred Stock

WHEREAS, pursuant to the Certificate of Designation of the Company's Series E

Convertible Preferred Stock (the "Series E Preferred Stock"), the Company is authorized

to pay dividends cumulative from the date of issuance of the Series E Preferred Stock in arrears on the fifteenth day of January, April, July and October.

WHEREAS, the Board of Directors desires to declare a cash dividend of approximately $0.96 (to be calculated pursuant to the formula set forth in the Certificate of Designation) on each of the issued and outstanding shares of Series E Preferred Stock of the Company payable on January 15, 2001 to stockholders of record on January 1, 2001.

NOW, THEREFORE, BE IT RESOLVED, that a cash dividend of approximately $0.96 (to be calculated pursuant to the formula set forth in the Certificate of Designation) on each of the Company's issued and outstanding shares of Series E Preferred Stock, payable on January 15, 2001 to stockholders of record on January 1, 2001, is hereby declared.

Declaration of Dividend on Common Stock

WHEREAS, pursuant to Section C, Paragraph (2) of Article IV of the Company's Certificate of Incorporation and in accordance with the General Corporation Law of the State of Delaware, the Board of Directors may declare payment of a dividend on the common stock of the Company.

WHEREAS, the Board of Directors of the Company desires to declare a dividend of $0.1375 per each issued and outstanding share of the Company's Common Stock (both

Class A and Class B shares) payable on January 15, 2001 to stockholders of record on January .1, 2001;

WHEREAS, after due analysis, the Board of Directors has concluded that the payment of said dividend is permitted under the Delaware General Corporation Law and the contractual obligations to which the Company is subject, if any;

NOW, THEREFORE; BE IT RESOLVED, that a dividend of $0.1375 per each issued and outstanding share of the Company's Common Stock (both Class A and Class B shares), payable January 15, 2001 to stockholders of record on January 1, 2001, is hereby declared.

3. CONFIRMATION AND RATIFICATION OF ACTIONS TAKEN BY THE EXECUTIVE COMMITTEE.

WHEREAS, on September 1, 1997, in order to enhance corporate flexibility and assist in corporate governance between scheduled board meetings, the Board of Directors expanded the authority granted to the Executive Committee to the full extent permitted by the Delaware General Corporation Law;

WHEREAS, in order to facilitate the transaction of business by the Company, the Executive Committee took certain authorized actions in the interim time period since the last hoard meeting;

NOW, THEREFORE, BE IT RESOLVED, that the actions taken by the Executive Committee via unanimous written consent as summarized below, of which full and complete originals have been inserted into the Company's minute book, and which are incorporated herein by this reference, are confirmed and ratified as of such date, with the same force and effect as if such actions and resolutions were taken or adopted by the Board of Directors:

(a) September 15, 2000. Authorization and approval of sale of certain assets to Newspaper Holdings, Inc.

(b) September 18, 2000. Authorization and approval of sale of certain assets to Paxton Media Group.

(c) September 19, 2000. Authorization and approval of sale of certain assets to Forum Communications.

(d) October 16, 2000. Authorization and approval of acquisition of certain assets of The Copley Press, Inc.

(e) October 25, 2000. Authorization and approval of $4,000,000 contribution of capital to Publishing.

4. GENERAL.

RESOLVED, that the appropriate officers of the Company be, and they hereby are, authorized and empowered to take all such further action, including without limitation to negotiate, arrange for, enter into, execute and deliver such agreements, instruments,

certificates or documents, in the name and on behalf of the Company, which in their sole judgment are necessary, proper or advisable in order to effectuate all of the foregoing resolutions.

HLR 005456

Govt. Exh. Board 1D

APPENDIX JJ

Facsimile Cover Sheet

To:	Darren Sukonick
Firm:	Torys
Phone:	416-865-0040
Fax:	416-865-7380
From:	Mark S. Kipnis
Company:	Hollinger International Inc.
Phone:	312-321-2206
Fax:	312-321-0629
Date:	January 23, 2002
Pages:	2

CONFIDENTIAL

This material is intended for the use of the individual to whom it is addressed. It may contain information that is privileged, confidential and exempt from disclosure under the law. If the reader of this message is not the intended recipient, you are notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you receive this communication in error, please notify us immediately by telephone, and return the original message to us at 312/321-0629. Thank you.

COMMENTS:

U.S. noncompete payments made during calendar year 2000.

AMERICAN PUBLISHING MANAGEMENT SERVICES, INC.

606 North Van Buren
Marion, IL 62859
Telephone (618) 993-1711
Fax (618) 997-5209

January 23, 2002

To: Mark Kipnis
From: Lisa Morse
Re: 2000 Payments

Roland wanted me to fax you a list of payments issued from this office in 2000.

F. David Radler	56,912,500.00
Lord Black	$6,912,500.00
Peter Adamson	$587,500.00
Jack Boultbee	$587,500.00

If you have any questions or need any further information, then please call me at (618) 993-1711.

Sincerely,

/s/

Lisa Morse
Accounts Payable

Govt. Exh. CanWest 81

APPENDIX KK

Beck, Andrew

From: Sukonick, Darren

Sent: Sunday, February 17, 2002, 11:57 AM

To: Peter Atkinson (E-mail 2)

Subject: U.S Sale Non-Comp. Payments

Peter, you asked for a brief note summarizing our view on the non-competition payments related to the U.S. asset sales (the "U.S. sale non-comp. payments"). These types of related party payments are required to be disclosed in accordance with specific form requirements which require the disclosure to be in the proxy statement. As far as I am aware (based on a review of the HII 2001 proxy statement and 2001Q1 10-Q and HI 2001 proxy circular and 2001 AIF), the U.S. sale non-comp. payments have never been disclosed. Although the 2001 amounts, on their own, may not be considered by management to be material, taken together with undisclosed 2000 amounts, they are likely material (and certainly more material than the similar Osprey payments).

It would be prudent for both HI and HII to disclose all of the previously undisclosed non-comp. payments in the 2002 proxy materials (i.e., Osprey payments and U.S. sale non-comp. payments in 2000 and 2001). We could considering aggregating the 2001 and 2000 amounts as follows (based on a theory that the total amounts were only fixed and finalized in 2001):

In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, Lord Black and Messrs. Boultbee, Radler and Atkinson entered into non-competition agreements with the purchasers pursuant to which each agreed not to compete directly or indirectly in the United States with the United States businesses sold to the purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 and 2000 of $15,600,000, consisting of $7,197,500 paid to Lord Black, $7,197,500 paid to paid to Mr. Radler, $602,500 paid to Mr. Boultbee and $602,500 paid to Mr. Atkinson.

Please contact me if you want to discuss this further.

Darren E. Sukonick

Torys LLP

Tel: 416.865.8195
Fax: 416.865.7380
mailto: dsukonick@torys.com
www.torys.com

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Govt. Exh. CanWest 82

APPENDIX LL

Hollinger

F. David Radler
President and Chief Operating Officer

Telephone: (604) 732-4443
Fax: (604) 732-5564

DATE: August 1, 2000

TO: Conrad M. Black
Jack Boultbee
Peter Atkinson
Jerry Strader
Mark Kipnis

FROM: F. David Radler

RE: American Community Newspapers

We have completed the sale of the American Community Newspapers.

- Michigan was purchased by the Paxton Group for $59 M
- Forum Publications bought North Dakota for $14 MM

- Community Newspapers Holdings Inc. purchased the balance (excluding Monmouth) for $98.2 MM

We have an offer for Monmouth at $2 MM that we are trying to increase. Including Monmouth at the $2 MM level, we sold the group at $173.2 MM. When Bradford is added at $38 MM and Hawaii at $3.1 MM, the division went for $214.3 MM plus working capital.

1999 EBITDA plus management fees totaled $16,939,000 which gives us 12.4 X's pre-management fee (excluding Hawaii) and a likely 13.4 X's post-management fee.

Unfortunately, the two major purchasers have asked for a 5-year non-compete from Conrad and me covering not only the states wherein they purchased assets but those states that border the said states. This would leave us only Alaska, Wyoming and Louisiana for us to continue our activities. I have, therefore, allocated 42.6% of the purchase price to our joint non-compete. I have been assured there is suitable accommodation four our new headquarters in Casper, Wyoming.

/s/
Hollinger, Inc., 1827 West 5th Avenue, Vancouver, British Columbia V6J 1P5

Govt Exh. CNHI 25

APPENDIX MM

Hollinger

TELEPHONE: (416) 363-8721
FAX: (416) 364-0832

The Ravelston Corporation limited
10 Toronto Street
Toronto, Ontario
M5C 2B7

Attention: The Lord Black of Crossharbour
Chief Executive

Dear Lord Black:

Re: Premises and Operations at 10 Toronto Street, Toronto

As you know, the premises at 10 Toronto Street are owned by 10 Toronto Street Inc., an indirect wholly-owned subsidiary of Hollinger Inc. No lease or license exists for the occupation of premises therein by The Ravelston Corporation Limited, any of its affiliates (other than Hollinger Inc. and its subsidiaries), its shareholders or its officers and directors (except Peter White who is an officer and director of Hollinger Inc.). Likewise, various equipment, systems and benefit plans, as well as staff, are shared in one manner or another between Hollinger Inc. and Ravelston and its related parties.

This letter will serve as formal notice that Hollinger Inc. and 10 Toronto Street Inc. will require that

Ravelston and its related parties (other than Hollinger and its subsidiaries and Mr. White) vacate the premises at 10 Toronto Street on of before May 31, 2005. We realize that this will require us to rationalize staff between the groups and to develop a plan for disentangling various services and benefit plans, not the lest of which will be the computer systems. We anticipate forming a working group to produce an equitable and non-intrusive plan for achieving this objective.

Yours very truly,

HOLLINGER, INC.

/s/
April 13, 2005

Gordon W. Walker
Chairman of the Board

cc Peter G. White

INCG001391

HOLLINGER INC., 40 TORONTO STREET,
TORONTO, CANADA MSC 237

NOT ADMISSIBLE as to Boultbee,
Atkinson, or Kipnis

HOLLINGER INC.

Resolution of the Independent Committee

WHEREAS:

A. the premises at 10 Toronto Street are owned by 10 Toronto Street Inc., an indirect wholly-owned subsidiary of Hollinger Inc. (the "Corporation");

B. no lease or license exists for the occupation of premises therein by The Ravelston Corporation Limited ("Ravelston"), any of its affiliates (other than Hollinger Inc. and its subsidiaries), its shareholders or its officers and directors (except Peter White who is an officer and director of Hollinger Inc.); and

C. various equipment, systems and benefit plans, as well as staff, are shared in one manner or another between the Corporation and Ravelston and its related parties.

NOW THEREFORE, be it resolved that:

1. formal notice be given to Ravelston that the Corporation and 10 Toronto Street Inc. require that Ravelston and its related parties (other than the Corporation and its subsidiaries and Peter G. White) vacate the premises at 10 Toronto Street on of before May 31, 2005; and

2. in order to rationalize staff between the Corporation and Ravelston and to develop a plan for disentangling various services and benefit plans, the Corporation form a working group with Ravelston to produce an equitable and non-intrusive plan for achieving this objective.

PASSED at Toronto on April 13, 2005

/s/
Paul A. Carroll

/s/
Robert Metcalfe

/s/
Donald M.J. Vale

/s/
Allan Wakefield

/s/
Gordon W. Walker

INCG001392

PGW sent to:

Copy:

Mark Comely
Alan Mark
Ian Ness
Tony Reyes
Derek Tay
Jack Boultbee
Harry Burkman
Avi Greenspoon
David Wingfield
Jinn Badenhauaen.

INCG001393

Govt. Exh. Eviction Letter 1

APPENDIX NN

UNANIMOUS WRITTEN CONSENT OF THE EXECUTIVE COMMITTEE OF THE BOARD OF DIRECTORS OF HOLLINGER INTERNATIONAL INC. DATED AS OF SEPTEMBER 18, 2000

In conformity with Section 141(f) of the General Corporation Laws of the State of Delaware and the By-laws of Hollinger International Inc., a Delaware corporation ("International"), the undersigned, being all of the members of the Executive Committee of the Board of Directors of International (the "Executive Committee"), hereby consent to and adopt the following resolutions and take the following actions via this Unanimous Written Consent:

1. **APPROVAL OF DISPOSITION OF US COMMUNITY GROUP ASSETS**

   Sale of Publications to Paxton Media Group, Inc.

   RESOLVED, that the resolutions set forth on Exhibit A, attached hereto, are hereby approved and adopted and incorporated herein in their entirety.

2. **EXECUTION IN COUNTERPART**

   RESOLVED, that this Unanimous Written Consent may be signed via facsimile signature and in various counterparts which

together shall constitute one and the same original instrument.

IN WITNESS WHEREOF, the undersigned, being all of the Members of the Executive Committee of the Board of Directors of International, have executed this Consent as of the date first above written.

/s/_____
Conrad M. Black

/s/_____
F. David Radler

/s/_____
Richard N. Perle

being all of the Members of the Executive Committee of International

HLR 005443

EXHIBIT A

2. APPROVAL OF DISPOSITION OF CERTAIN ASSETS TO PAXTON MEDIA GROUP

WHEREAS, International's Board of Directors has approved the disposition by Company of substantially all of the assets and real property of certain of its indirect wholly owned subsidiaries relating to the publications set forth on Schedule 1, attached hereto to Paxton Media Group, Inc. ("Paxton"), and the execution by International of a 3-year mutually acceptable noncompete agreement by International and certain executive officers of International be approved in exchange for an aggregate purchase price of approximately Ninety-Eight Million Two Hundred Thousand Dollars ($98,200,000) ("Paxton Transaction").

NOW, THEREFORE, BE IT RESOLVED, that the Paxton Transaction is hereby approved and authorized.

RESOLVED, that the proper officers of International are hereby authorized and directed to take all such actions, including, without limitation, to negotiate, arrange for and enter into, all terms, conditions, agreements, instruments, certificates, documents or financing arrangements, in the name and on behalf of International, which in their sole judgment are necessary, proper or advisable in order to effectuate the Paxton Transaction, including, but not limited to, an asset purchase agreement, a noncompete

agreement, deeds, assignments; and bills of sales .

2. **GENERAL.**

RESOLVED, that the appropriate officers of International be, and they hereby are, authorized and empowered to take all such further action, including without limitation to negotiate, arrange for, enter into, execute and deliver such agreements, instruments, certificates or documents, in the name and on behalf of International, which in their sole judgment are necessary, proper or advisable in order to effectuate all of the foregoing resolutions.

HLR 005444

Govt. Exh. Executive 1D

APPENDIX OO

UNANIMOUS WRITTEN CONSENT OF THE EXECUTIVE COMMITTEE OF THE BOARD OF DIRECTORS OF HOLLINGER INTERNATIONAL INC. DATED AS OF SEPTEMBER 19, 2000

In conformity with Section 141(f) of the General Corporation Laws of the State of Delaware and the By-laws of Hollinger International Inc., a Delaware corporation ("International"), the undersigned, being all of the members of the Executive Committee of the Board of Directors of International (the "Executive Committee"), hereby consent to and adopt the following resolutions and take the following actions via this Unanimous Written Consent:

1. **APPROVAL OF DISPOSITION OF US COMMUNITY GROUP ASSETS**

   Sale of Publications to Forum Communications Inc.

   RESOLVED, that the resolutions set forth on Exhibit A, attached hereto, are hereby approved and adopted and incorporated herein in their entirety.

2. **EXECUTION IN COUNTERPART**

   RESOLVED, that this Unanimous Written Consent may be signed via facsimile signature and in various counterparts which

together shall constitute one and the same original instrument.

IN WITNESS WHEREOF, the undersigned, being all of the Members of the Executive Committee of the Board of Directors of International, have executed this Consent as of the date first above written.

/s/ _____
Conrad M. Black

/s/ _____
F. David Radler

/s/ _____
Richard N. Perle

being all of the Members of the Executive Committee of International

HLR 005446

EXHIBIT A

2. APPROVAL OF DISPOSITION OF CERTAIN ASSETS TO FORUM COMMUNICATIONS COMPANY

WHEREAS, International's Board of Directors has approved the disposition by Company of substantially all of the assets and real property of certain of its indirect wholly owned subsidiaries relating to the publications set forth on Schedule 1, attached hereto to Forum Communications Company ("Forum"), and the execution by International of a 3-year mutually acceptable noncompete agreement by International and certain executive officers of International be approved in exchange for an aggregate purchase price of approximately $14,000,000.00 plus or minus the Initial Net Working Capital Determination ("Forum Transaction").

NOW, THEREFORE, BE IT RESOLVED, that the Forum Transaction is hereby approved and authorized.

RESOLVED, that the proper officers of International are hereby authorized and directed to take all such actions, including, without limitation, to negotiate, arrange for and enter into, all terms, conditions, agreements, instruments, certificates, documents or financing arrangements, in the name and on behalf of International, which in their sole judgment are necessary, proper or advisable in order to effectuate the Forum Transaction, including, but not limited to, an asset purchase agreement, a noncompete

agreement, deeds, assignments, and bills of sales.

2. GENERAL.

RESOLVED, that the appropriate officers of International be, and they hereby are, authorized and empowered to take all such further action, including without limitation to negotiate, arrange for, enter into, execute and deliver such agreements, instruments, certificates or documents, in the name and on behalf of International, which in their sole judgment are necessary, proper or advisable in order to effectuate all of the foregoing resolutions.

HLR 005447

Govt. Exh. Executive 1E

APPENDIX PP

From: Boudbee, Jack [JBoudbee@Hotmgerint.com]
ent: December 11, 2001 3:52 PM
o: tblack@poststamp.net
Subject: 2002 salaries

SAL2002.xls (70 KB)

Conrad

I attach a first cut at this year's bonuses and next year's salaries. All raises and bonuses are at standard rates except for staff who have not worked a full year and Camila and Duckworth for whom I have proposed an 8% increase. As you can see Spencer will retire in April and we will not replace him. these two will take on the bulk of his work. I don't have full input on all of the admin staff so there may be some small changes plus and minus. Please call me to discuss your suggestions. Jack <<SAL2002.xls>>

This message is intended only for the use of the Addressee and may contain information that is PRIVILEGED and CONFIDENTIAL. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please erase all copies of the message and its attachments and notify us immediately.

GA467

INC . 018865

Govt. Exh. Expense 7

APPENDIX QQ

From: Boutbee, Jack [JBoutbee@hollingerinc.com]
Sent: Wednesday, December 18, 2002 11:18 AM
To: Conrad Black (E-mail)
Subject: Salaries

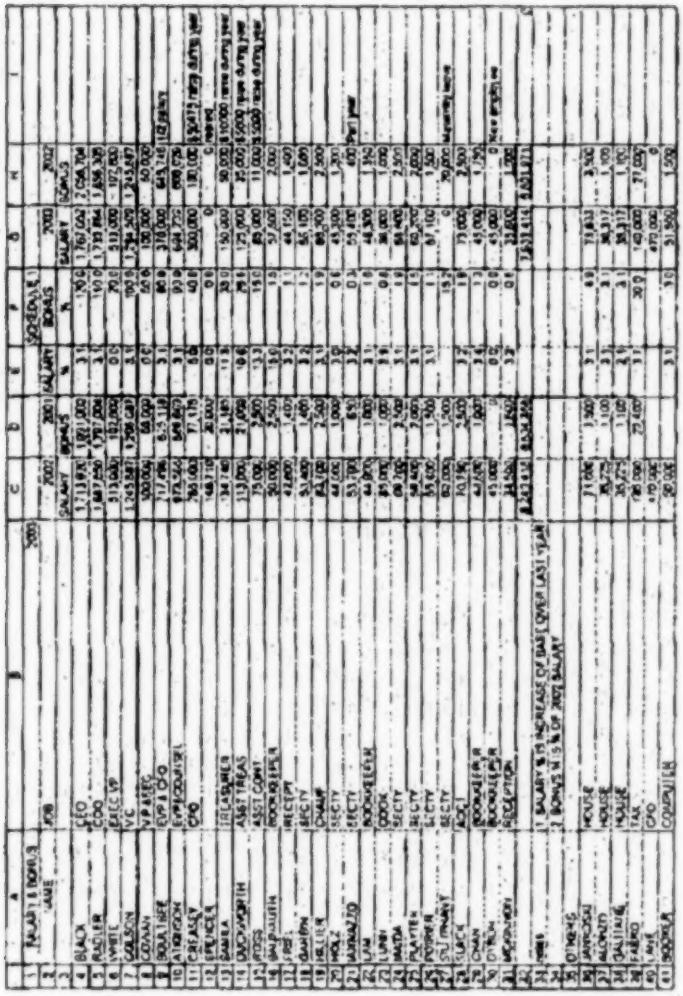
SAL2003.xls

Dear Conrad

Your EFP powers must be wabing. This time I will attach the list. It is in excel.

<<SAL2003.xls>>
Regards
Jack

This message is intended only for the use of the Addressee and may contain information that is PRIVILEGED and CONFIDENTIAL. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please erase all copies of the message and its attachments and notify us immediately.



From: Boudbee, Jack [JBoudbee@Hollingerinc.com]
Sent: Wednesday, December 18, 2002 10:08 AM
To: Conrad Black (E-mail)
Subject: Salaries

Dear Conrad

Because everyone has been working full out it has been very difficult to get them to address salary and bonus levels. I now have all the input. I know it is short notice but I would like to issue bonuses this week so I wondered if I could have your comments and/or approval. As usual some of these amounts will be paid as dividends or may be included in management fees to companies other than Ravelston.

I will pass on my comments on musings shortly.

Regards
Jack

This message is intended only for the use of the Addressee and may contain information that is PRIVILEGED and CONFIDENTIAL. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please erase all copies of the message and its attachments and notify us immediately.

Govt. Exh. Expense 8

APPENDIX RR

Govt. Exh. Filing 9F

* * * * *

2001 Annual Report for Hollinger International
April 1, 2002

[38]

Related Party Transactions

Net amounts due from related companies at December 31, 2001 totalled $32.2 million and included a $36.8 million loan to a subsidiary of Hollinger Inc., net of amounts payable in respect of management and administrative expenses billed by Hollinger Inc. and corporate affiliates of Hollinger Inc. Hollinger Inc. and its affiliates billed the Company for allocable expense amounting to $34.3 million, $41.0 million and $38.2 million for 2001, 2000 and 1999, respectively (principally including management fees that were approved by the audit committee). On July 11, 2000, the Company loaned $36.8 million to a subsidiary of Hollinger Inc. in connection with the cash purchase by Hollinger Inc. of HCPH Special shares. The loan is payable on demand and to December 31, 2001, interest was payable at the rate of 13% per annum. Effective January 1, 2002, the interest rate was adjusted to LIBOR plus 3% per annum.

Lord Black indirectly has voting control of the Company. During each of 2001, 2000 and 1999 remuneration paid directly by the Company and its subsidiaries to Lord Black was $817,000, $2,477,000 and $640,000, respectively.

In two separate transactions in July and November, 2001, the Company and Hollinger L.P. completed the sale of most of its remaining Canadian newspapers to Osprey for total sale proceeds of approximately Cdn. $255 million ($166 million) plus closing adjustments primarily for working capital. The former Chief Executive Officer of Hollinger L.P. is a minority shareholder of Osprey. The Company's independent directors have approved the terms of these transactions.

In connection with the two above sales of Canadian newspaper properties to Osprey, to satisfy a closing condition, the Company, Hollinger Inc., and Lord Black and three senior executives entered into non-competition agreements with Osprey pursuant to which each agreed not to compete directly or indirectly in Canada with the Canadian businesses sold to Osprey for a five-year period, subject to certain limited exceptions, for aggregate consideration of Cdn. $7.9 million ($5.1 million). Such consideration was paid to Lord Black and the three senior executives and has been approved by the Company's independent directors.

On November 16, 2000, the Company and its affiliates, Southam and Hollinger L.P. ("Hollinger Group") completed the sale of most of its Canadian newspapers and related assets to CanWest. The aggregate sale price of these properties at fair value

was approximately Cdn. $2.8 billion ($1.8 billion), plus closing adjustments for working capital at August 31, 2000 and cash flow and interest for the period September 1 to November 16, 2000 which in total at December 31, 2000 approximated an additional $40.7 million.

In connection with the sale to CanWest, Ravelston, a holding company controlled by Lord Black through which most of his interest in the company is ultimately controlled, entered into a management services agreement with CanWest and National Post pursuant to which it agreed to continue to provide management services to the Canadian businesses sold to CanWest in consideration for an annual fee of Cdn. $6 million ($4 million) payable by CanWest. In addition, CanWest will be obligated to pay Ravelston a termination fee of Cdn. $45 million, in the event that CanWest chooses to terminate the management services agreement or Cdn. $22.5 million, in the event that Ravelston chooses to terminate the agreement (which cannot occur before December 31, 2002). Also, as required by CanWest as a condition to the transaction, the Company, Ravelston, Hollinger Inc., Lord Black and three senior executives entered into non-competition agreements with CanWest pursuant to which each agreed not to compete directly or indirectly in Canada with the Canadian business sold to CanWest for a five-year period, subject to certain limited exceptions, for aggregate consideration of Cdn. $80 million ($53 million) paid by CanWest in addition to the purchase price referred to above of which Cdn. $38 million ($25.2 million) was paid to Ravelston and Cdn.

$42 million ($27.8 million) was paid to Lord Black and the three senior executives. The Company's independent directors have approved the terms of these payments.

[39] During 2000, the Company sold most of its remaining U.S. community newspaper properties, for total proceeds of approximately $215 million. In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, the Company, Lord Black and three senior executives entered into non-competition agreements with the purchasers to which each agreed not to compete directly or indirectly in the United States with the United States businesses sold to purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 of $0.6 million. These amounts were in addition to the aggregate consideration paid in respect of these non-competition agreements in 2000 of $15 million. Such amounts were paid to Lord Black and the three senior executives. The Company's independent directors have approved the terms of these payments.

Included in the above sale, the Company sold four U.S. Community Newspapers for an aggregate consideration of $38 million to Bradford Publishing Company, a company formed by a former U.S. Community Group executive and in which some of the Company's directors are shareholders. The terms of this transaction were approved by the independent directors of the Company.

During 1999, the Company sold to Horizon Publications Inc. 33 U.S. community newspapers for

$43.7 million. During 2001, the Company transferred two publications to Horizon Publications Inc. in exchange for net working capital. Horizon Publications Inc. is managed by former Community Group executives and controlled by certain members of the Board of Directors of the Company. The terms of these transactions were approved by the independent directors of the Company.

The Company issued to Hollinger Inc. in connection with the 1995 Reorganization in which the Company acquired Hollinger Inc.'s interest in The Telegraph and Southam, 739,500 shares of Series A Preferred Stock. The Series A Preferred Stock was subsequently exchanged for Series D Preferred Stock. During 1998, 408,551 shares of Series D Preferred Stock were converted into 2,795,165 shares of Class A Common Stock. In February 1999, 196,823 shares of Series D Preferred Stock were redeemed for cash of $19.4 million. In May 1999, the remaining 134,126 shares of Series D Preferred Stock were converted into 134,126 shares of Series E Preferred Stock. In September 2001, 40,920 shares of Series E Preferred Stock were redeemed for cash of $3.8 million. The shares of Series E Preferred Stock are redeemable in whole or in part, at any time and from time to time, subject to restrictions in the Company's credit facilities, by the Company or by a holder of such shares.

Pursuant to a January 1997 transaction wherein the Company acquired Canadian publishing assets from Hollinger Inc., the Company issued 829,409 shares of Series C Preferred Stock. The stated value of each share was $108.51. On June 1,

2001, the Company converted all the Series C Preferred Stock at the conversion ratio of 8.503 shares of Class A Common Stock per share of Series C Preferred Stock into 7,052,464 shares of Class A Common Stock. On September 5, 2001, the Company purchased for cancellation, from Hollinger Inc., the 7,052,464 shares of Class A Common Stock for a total cost of $92.2 million or $13.07 per share which represented 98% of the September 5, 2001 closing price.

[44] SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this 10-K to be signed on its behalf by the undersigned, thereunto duly authorized.

HOLLINGER
INTERNATIONAL INC.
(Registrant)

By: /s/ CONRAD M. BLACK

Lord Black of Crossharbour,
PC(C), OC, KCSG,
Chairman and Chief Executive
Officer

Date: March 28, 2002

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the

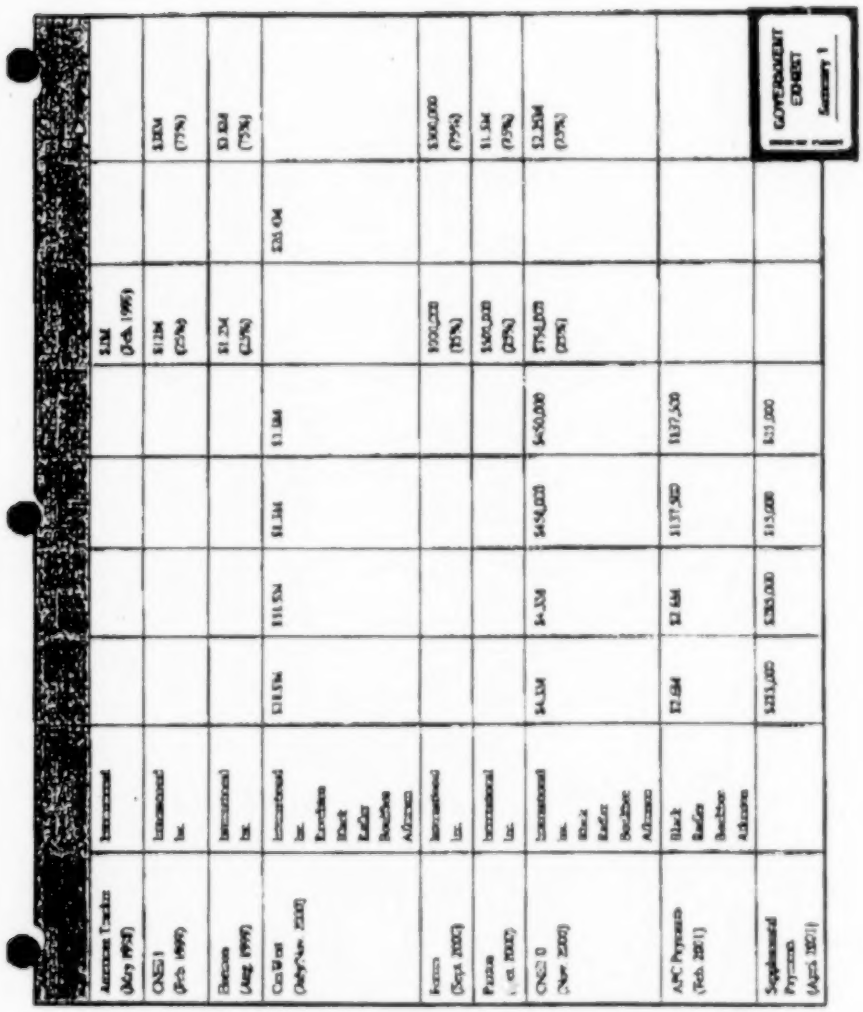
registrant and in the capacities on the dates indicated.

Signature	Title	Date
/s/ CONRAD M. BLACK Conrad M. Black	Chairman, Chief Executive Officer and Director (Principal Executive Officer)	March 28, 2002
/s/ JOHN A BOULTBEE John A Boultbee	Executive Vice President (Principal Financial Officer)	March 28, 2002
/s/ FREDERICK A. CREASEY Frederick A. Creasey	Group Corporate Controller (Principal Accounting Officer)	March 28, 2002
/s/ F. DAVID RADLER F. David Radler	Deputy Chairman, President, Chief Operating Officer and Director	March 28, 2002

/s/ DANIEL W. COLSON Daniel W. Colson	Vice Chairman and Director	March 28, 2002
/s/ BARBARA AMIEL BLACK Barbara Amiel Black	Vice President — Editorial and Director	March 28, 2002
/s/ DWAYNE O. ANDREAS Dwayne O. Andreas	Director	March 28, 2002
/s/ RICHARD R. BURT Richard R. Burt	Director	March 28, 2002
/s/ Raymond G. Chambers	Director	March 28, 2002
/s/ HENRY A. KISSINGER Henry A. Kissinger	Director	March 28, 2002
/s/ MARIE-JOSEE KRAVIS Marie-Josee Kravis	Director	March 28, 2002

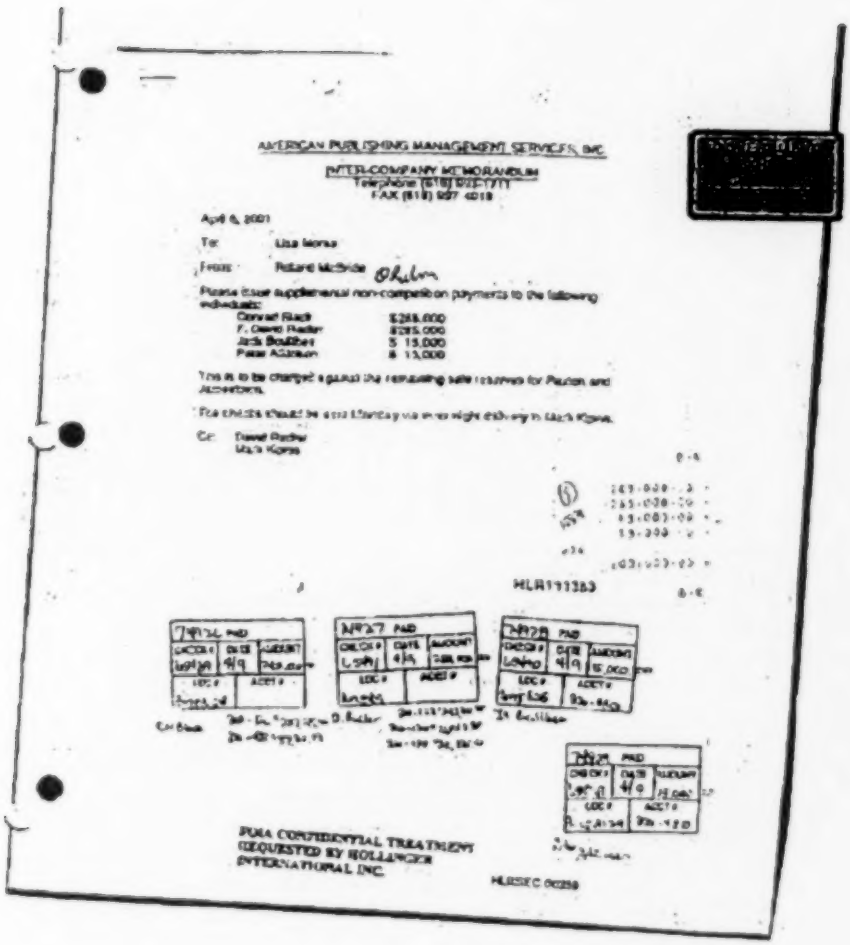
[45] Signature	Title	Date
/s/ Shmuel Meitar	Director	March 28, 2002
/s/ RICHARD N. PERLE Richard N. Perle	Director	March 28, 2002
/s/ ROBERT S. STRAUSS Robert S. Strauss	Director	March 28, 2002
/s/ A. Alfred Taubman	Director	March 28, 2002
/s/ JAMES R. THOMPSON James R. Thompson	Director	March 28, 2002
/s/ Lord Weidenfeld	Director	March 28, 2002
/s/ LESLIE H. WEXNER Leslie H. Wexner		

APPENDIX SS



Govt. Exh. Summary 1

APPENDIX TT



AMERICAN PUBLISHING MANAGEMENT SERVICES, INC.

INTER-COMPANY MEMORANDUM
Telephone (818) 923-1711
FAX (818) 927-4018

April 6, 2001

To: Lisa Morse

From: Roland McBride

Please issue supplemental non-competition payments to the following individuals:

Conrad Black	$288,000
F. David Radler	$285,000
Jack Boulliber	$ 15,000
Peter Atkinson	$ 15,000

This is to be charged against the remaining sale reserves for Paulson and Jacobson.

The checks should be sent Monday via overnight delivery to Mark Kipnis.

Cc: David Radler
Mark Kipnis

HLR111383

PMA CONFIDENTIAL TREATMENT REQUESTED BY HOLLINGER INTERNATIONAL INC.

HLRSEC 00259

AMERICAN PUBLISHING MANAGEMENT SERVICES, INC.

THE FIRST NATIONAL BANK OF CHICAGO

065489

CHECK DATE	CHECK NO.	AMOUNT
04/09/01	65489	$285,000.00

PAY TWO HUNDRED EIGHTY-FIVE THOUSAND DOLLARS AND NO CENTS

TO THE ORDER OF C.H. BLACK

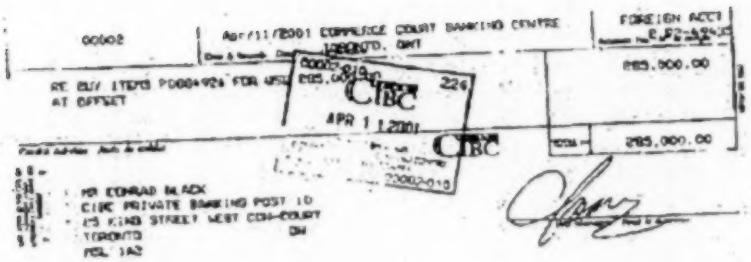
VOID AFTER 90 DAYS

DENISE

HLR111382

DIA CONFIDENTIAL TREATMENT EQUESTED BY HOLLINGER NTERNATIONAL INC.

HLRSEC1639
GA631



FOIA CONFIDENTIAL
TREATMENT REQUESTED
BY C. BLACK

CMB 0007782

			DISCOUNT	NET AMOUNT	
NON-COMPET	4/30/01	$285,000.00		$285,000.00	NON-COMPETE PYMT

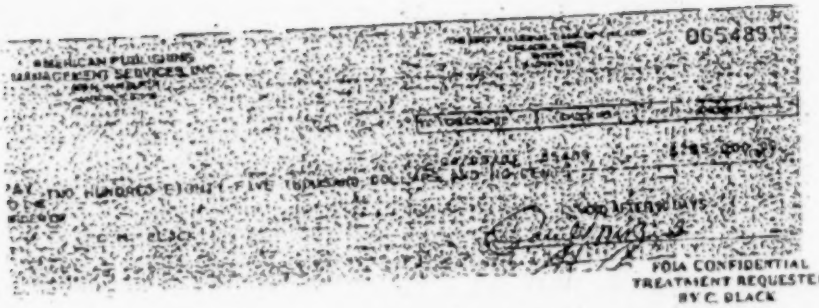
BLACK CO AP0274 05429

FOIA CONFIDENTIAL
TREATMENT REQUESTED
BY C. BLACK

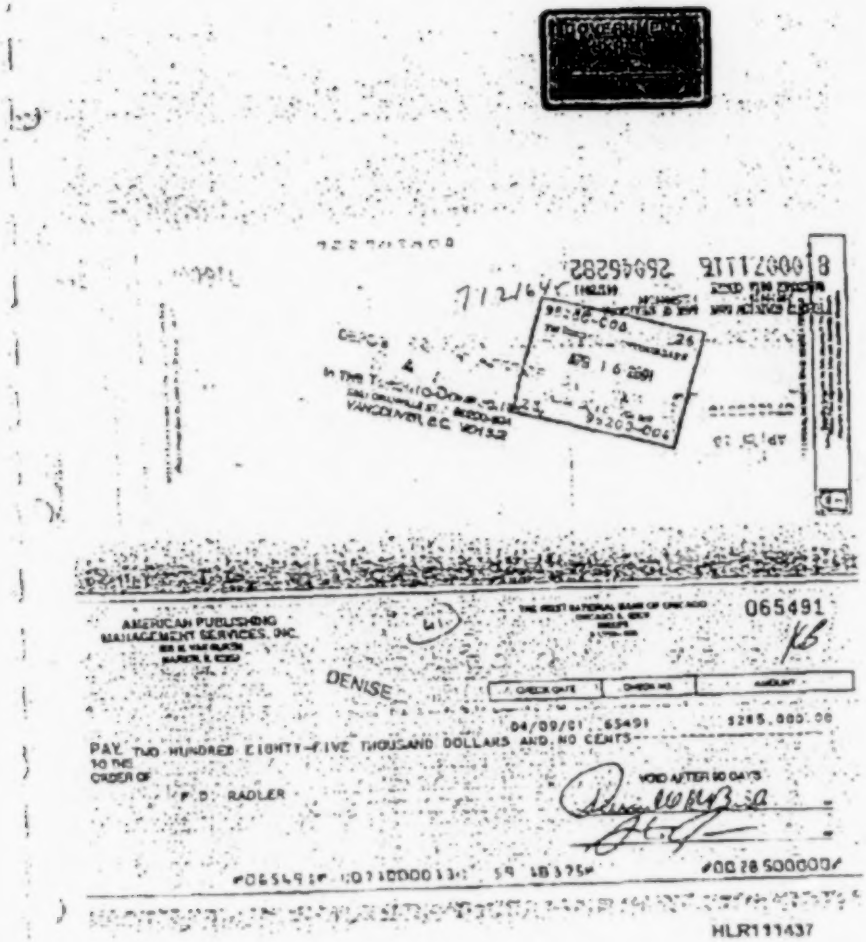
CMB 0007783

GA633

CMB0007783



GA634 CMB0007784



AMERICAN PUBLISHING MANAGEMENT SERVICES, INC.

065491

DENISE

04/09/01 65491 $285,000.00

PAY TWO HUNDRED EIGHTY-FIVE THOUSAND DOLLARS AND NO CENTS

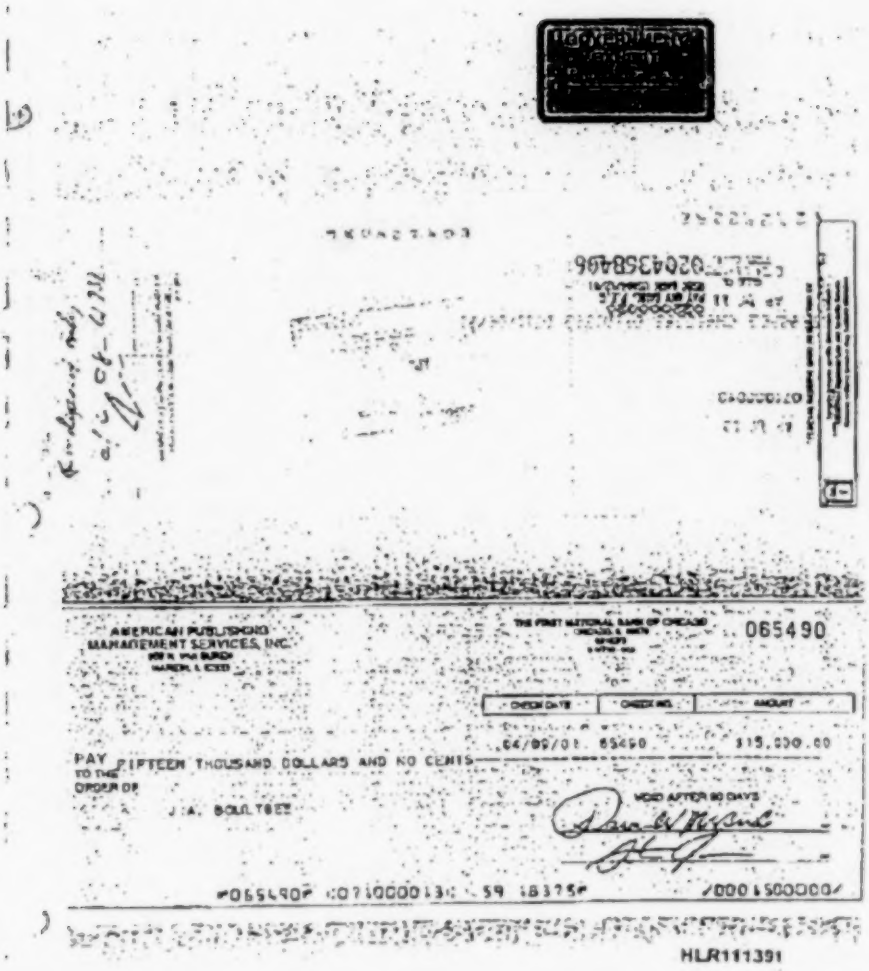
TO THE ORDER OF F. D. RADLER

VOID AFTER 90 DAYS

HLR111437

DIA CONFIDENTIAL TREATMENT
EQUESTED BY HOLLINGER
NTERNATIONAL INC.

HLRSEC34398
GA635

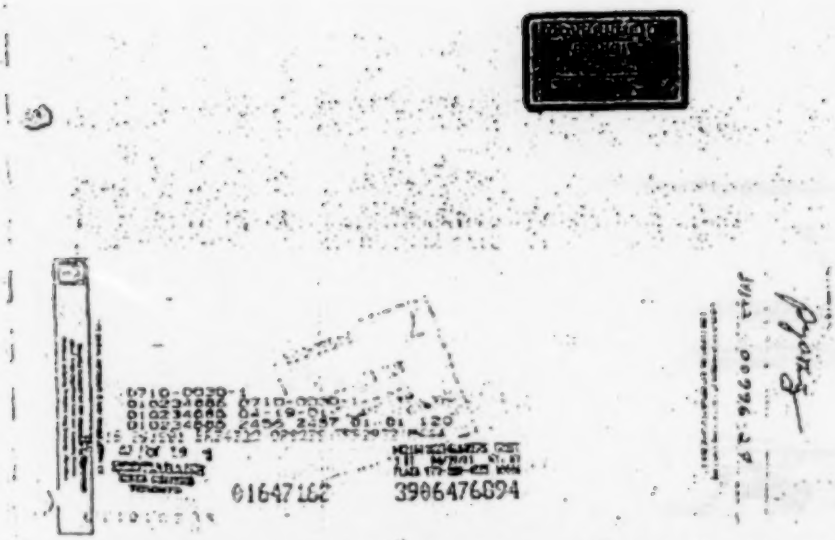


'OIA CONFIDENTIAL TREATMENT
REQUESTED BY HOLLINGER
NTERNATIONAL INC.

HLRSEC1499
GA638

0710-0030-1
010234686 0710-0030-1
010234686 04-19-01
010234686 2456 2457 01 01 120

01647162 3906476094



AMERICAN PUBLISHING
MANAGEMENT SERVICES, INC.

THE FIRST NATIONAL BANK OF CHICAGO
CHICAGO, IL 60670

065488

CHECK DATE	CHECK NO.	AMOUNT
04/09/01	65488	$15,000.00

PAY FIFTEEN THOUSAND DOLLARS AND NO CENTS
TO THE ORDER OF
PETER ATKINSON

VOID AFTER 90 DAYS

⑈065488⑈ ⑆071000013⑆ 59 18375⑈ ⑈0001500000⑈

HLR111373

NA CONFIDENTIAL TREATMENT
EQUESTED BY HOLLINGER
TERNATIONAL INC.

HLRSEC1635

GA837

REFERENCE NO.	DATE	AMOUNT	DISCOUNT	NET AMOUNT	DESCRIPTION
IDV-CONFEC	04/08/04	$15,000.00	--	$15,000.00	NON-COMPETE PYMT

NUCREAR PUBLISHING MANAGEMENT SERVICES, INC.

ATKINSON.P AREA129 65488

FOIA Confidential Treatment
Requested By Peter Atkinson
Pursuant To 17 CFR § 200.83
PA-30014

GA638

PA02001

Govt. Exhs. Supp Payment 1-6

APPENDIX UU

HOLLINGER INTL INC Fax:312-321-0529

** Transmit Conf. Report **

P.1 Apr 20 '01 10:29

Telephone Number	Mode	Start	Time	Page	Result	Note	L
12124743700	NORMAL	20.10:29	0'42"	2	* O K		2

[redacted]

Hollinger International Inc.

Fax

To William P. Rogers, Jr. From Mark Kipnis (312) 321-0206

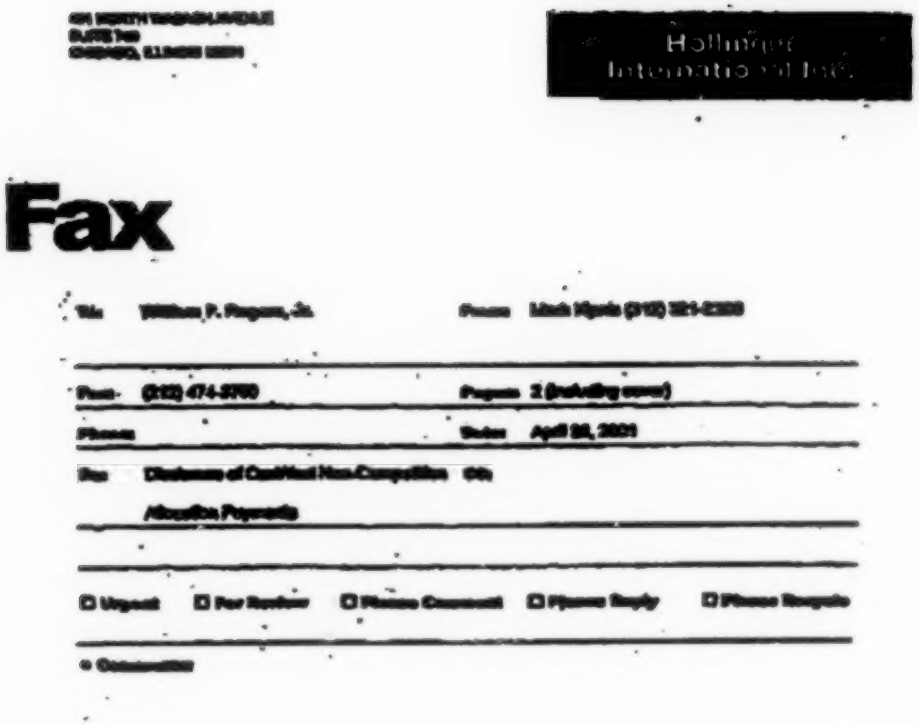
Fax (212) 474-3700 Pages 2 (including cover)

Phone Date Apr 20, 2001

Re Disclosure of Confidential Non-Competition and Allocation Payments

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• Comments



Kipnis Exh. CanWest 24

APPENDIX VV

Kipnis, Mark S.

From:	DSukonick@torys.com
Sent:	Thursday, April 19, 2001 11:12 AM
To:	mkipnis@hollingerintl.com; patkinson@hollingerinc.com
Cc:	BDeMerchant@torys.com; jguerard@torys.com
Subject:	Disclosure of CanWest Non-Competition Allocation Payments

Yesterday, Cravath raised the issue as to whether the amounts allocated to the CanWest non-competition payments should be disclosed in the offering memorandum. Mark, I think they contacted you directly on that. Jennifer explained to Cravath that Torys had reached the view that those payments were separately negotiated arrangements with the non-comp. parties and not affiliate payments from Hollinger, and, accordingly, did not need to be disclosed in the proxy statement and would not be disclosed in the offering memorandum. They accepted (and agreed) with that view and it is our understanding that the issue is dead.

Please contact me or Jennifer (212.880.6202) if you want to discuss this.

Darren E. Sukonick
TORYS
New York Toronto
Tel: 416.865.8195

Fax: 416.865.7380
E-Mail: dsukonick@torys.com
Internet: www.torys.com

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Kipnis Exh. Torys 5

APPENDIX WW

1/10/01
9:40 a.m.

Hi Mark. It's Darren Sukonick calling from Torys. Just wanted to let you know that we have canvassed internally the question as to whether or not the non-competitior payments have to be disclosed in the Hollinger International proxy circular as payments from Hollinger to the individuals on account of compensation and the like, and we agree that they do not have to be disclosed in that manner. They are payments that went directly from CanWest to the individuals and did not run through Hollinger. I think that answers your question, but if there's anything more that you needed on that, please give me a call at 416-865-8195.

Kipnis Exh. Torys 21

APPENDIX XX

Sukonick, Darren

From: Atkinson, Peter
[PAtkinson@hollinger.com]
Sent: February 19, 2002 11:59 AM
To: 'dsukonick@torys.com'
Subject: Fw: RE: U.S. Sale Non-Comp. Payments

Darren. As I am trying to take sortie time off could you please deal directly with Jack with cc to me. I will tell Charlie we won't be able to includ this in the draft proxy he wants to send to directors today. Thanks. Peter

—Original Message----
From: Boultbee, Jack <JBouitbee@Hollingerinc.com>
To: Atkinson, Peter <PAtkinson@hollinger.com>
Sent: Tue Feb 19 11:46:09 2002
Subject: RE: U.S. Sale Non-Comp. Payments

Peter
This doesn't include the Canwest amount. I have trouble disclosing only some of the payments. What is the rationale for excluding these? In a related matter the auditors are pushing for note disclosure of the amounts also. This is on the basis that, in their view, these are related party transctions. I think that their definition of "related" could be argued since really only Conrad is related. I thjink they are trying

to say that all officers are related. In any event, they will accept a note that tells the agregate amount paid and says that it was paid to certain officers and to Ravelston without naming anyone. Is it possible to bring the people around to that same type of wording for the Canadian proxy circular? Do you think that I should push them only to disclose Conrad's part in the notes to the financial statements? Jack

----Original Message---
From: Atkinson, Peter
Sent: Sunday, February 17, 2002 2:46 PM To:
Boultbee, Jack
Subject: Fw: U.S. Sale Non-Comp. Payments

Jack. We are into another disclosure issue with regard to the non competes paid on the sale of the community papers. I believe we have to make the suggested disclosure in hlg and hlr circulars. Do you have any comment? Peter

---Original Message---
From: DSukonick@torys.com
<DSukonick@torys,com>
To: patkinsonchollingerinc.com
<PAtkinson@hollinger,com>
CC: BDeMerchant@torys.com
<BDeMerchant@torys.com>; abeck@torys.com
<abeck@torys.com>
Sent: Sun Feb 17 11:57:22 2002
Subject: U.S. Sale Non-Comp. Payments

Peter, you asked for a brief note summarizing our view on the non-competition payments related to the U.S. asset sales (the "U.S. sale non-comp.

payments"). These types of related party payments are required to be disclosed in accordance with specific form requirements which require the disclosure to be in the proxy statement. As far as I am aware (based on a review of the HII 2001 proxy statement and 2001Q1 10-Q and HI 2001 proxy circular and 2001 AIF), the U.S. sale non-comp, payments have never been disclosed. Although the 2001 amounts, on their own, may not be considered by management to be material, taken together with undisclosed 2000 amounts, they are likely material (and certainly more material than the similar Osprey payments).

It would be prudent for both HI and HD to disclose all of the previously undisclosed non-comp, payments in the 2002 proxy materials (i.e., Osprey payments and U.S. sale non-comp. payments in 2000 and 2001). We could considering aggregating the 2001 and 2000 amounts as follows (based on a theory that the total amounts were only fixed and finalized in 2001):

In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, Lord Black and Messrs. Boultbee, Radler and Atkinson entered into non-competition agreements with the purchasers pursuant to which each agreed not to compete directly or indirectly in the United States with the United States businesses sold to the purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 and 2000 of $15,600,000, consisting of $7,197,500 paid to Lord Black,

$7,197,500 paid to paid to Mr. Radler, $602,500 paid to Mr. Boultbee and $602,500 paid to Mr. Atkinson.

Please contact me if you want to discuss this further.

Darren E. Sukonick

Torys LLP
Tel: 416.865.8195
Fax: 416.865.7380
mailto: dsukonick@torys.com
www.torys.com

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HLR117538

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APPENDIX YY

Hollinger International Inc.

Mark S. Kipnis
Vice President, Corporate Counsel
and Secretary

MEMORANDUM

VIA E-MAIL AND UPS

TO: Peter Y. Atkinson – Hollinger Inc.
J.A. Boultbee – Hollinger Inc.
Charles G. Cowan – Hollinger Inc.
Frederick A. Creasey – Hollinger Inc.
Larry Spencer – Hollinger Inc.
Paul B. Healy – Hollinger International Inc.
Robert Smith – Hollinger International Inc.
Beth DeMerchant – Torys
James Winikates – KPMG LLP

FROM: Mark S. Kipnis
Linda Loye

DATE: January 7, 2002

RE: 2002 Proxy Statement

Enclosed is a draft Proxy Statement.

Please review the draft and forward comments, changes or questions and additional factual information to us no later than February 6, 2002.

In particular, I would like the following individuals to take primary responsibility as follows:

1. Beth DeMerchant
    - Confirm whether and to what extent the various 2000 and 2001 non-compete payments must be disclosed as part of the Summary Compensation Table (page 14)
2. Paul Healy
    - Confirm with the Chairman that we intend to re-nominate all 16 directors.
3. Fred Creasey and Larry Spencer
    - Provide Series II Share/conversion info (page 6)
    - Provide Retractable Share/conversion info (page 6
    - Confirm Hollinger Inc. credit facility info (page 8)
    - Confirm Hollinger Inc. other arrangement info (page 8)
    - Confirm Ravelston management fees (page 8)
    - Confirm Moffatt management fees (page 9)
    - Confirm Hollinger Inc. vested and unvested options (pages 14-15)

encl.

---

401 North Wabash Avenue, Chicago, Illinois 60611
Telephone: (312) 321-2206 Facsimile: (312) 321-0629
email: MKipnis@hollingerintl.com

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APPENDIX ZZ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 695 – May 31, 2007]

UNITED STATES OF AMERICA,	)	
	)	No. 05 CR 727
v.	)	
	)	Honorable Amy J.
CONRAD M. BLACK, et al.	)	St. Eve,

STIPULATION

It is hereby STIPULATED and AGREED by and between the UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, and defendant CONRAD M. BLACK, individually and through his attorney, EDWARD M. GENSON as follows:

1. On or about November 18, 2003, the Staff of the Division of Enforcement of the United States Securities and Exchange Commission (the "SEC") advised counsel for BLACK in writing that the SEC was conducting an investigation regarding International. Additionally, on or about November 18, 2003, the SEC served counsel for

BLACK with the first of several subpoenas for documents requesting:

> "Any and all documents relating to the payment of fees, including management and noncompete fees, from Hollinger to or for the benefit of any personnel of Hollinger or its affiliates, including, but not limited to, Conrad Black, David Radler, Mark Kipnis, Peter Atkinson, Jack Boultbee and to or for the benefit of any entities, including, but not limited to, Ravelston Corp., Horizon Publications, Inc. and Bradford." (Govt. Exhibit Toronto 1)

BLACK's counsel provided documents to the SEC in response to the November 18, 2003 subpoena. BLACK'S counsel also provided documents in response to SEC subpoenas from December 12, 2003, February 19, 2004, March 3, 2004 and June 29, 2004. In total BLACK produced over 112,000 pages of documents to the SEC.

2. On or about August 27, 2004, the SEC notified BLACK in writing that it intended to recommend a civil injunctive action against BLACK relating to, among other things, "the transfer of Hollinger International, Inc. assets including, but not limited to, purported non-competition payments and sales of newspapers."

3. On or about November 15, 2004, the SEC filed a Complaint for Permanent Injunction and Other Equitable Relief against CONRAD BLACK and others (the "SEC proceeding"). The SEC's Complaint alleged that BLACK obtained money from International "through a series of related-party transactions" involving, among other things:

a. the CanWest non-compete payments;

b. the U.S. Community non-compete payments; and

c. the sale of newspaper assets from Iollinger International to Horizon.

An amended complaint was filed on March 10, 2005. Both complaints were served on BLACK's attorneys.

4. On or about March 21, 2005, the United States Attorney's Office for the Northern District of Illinois (the "government") filed a motion to intervene, for a limited, temporary stay of discovery in the SEC proceeding. In the motion, which was served on BLACK's counsel, the government declared:

> The United States Attorney's Office for the Northern District of Illinois [] is conducting a criminal investigation of Black, Radler, Hollinger, Inc. (collectively, 'the SEC defendants') and others relating to their conduct as to Hollinger International. The criminal investigation seeks to determine whether the SEC: defendants and others fraudulently diverted corporate assets and opportunities owned by Hollinger International to themselves and to companies that they controlled. The transactions under investigation include various purported 'non-competition payments' that were made lo Black, Radler, Hollinger, Inc. and others in connection with Hollinger International's sale of newspaper publications to third parties. The criminal investigation also seeks to determine whether fraud occurred in connection with Hollinger International's sale

> of newspaper publications to companies controlled by Black and Radler, as well as other transactions between Hollinger International and the SEC defendants and their companies. In connection with each of these related party transactions, the criminal investigation seeks to determine whether the transaction was appropriately disclosed to Hollinger International's independent directors, in Hollinger International's SEC filings, and during Hollinger International's shareholder meetings.
>
> The government further advised:
>
> The government's criminal investigation seeks to determine whether the SEC defendants and others have violated various federal criminal statutes . . . .

5. On or about April 20, 2005, the government's motion to intervene in the SEC Proceeding was granted.

6. As part of the SEC proceeding, on or about March 29, 2005, the SEC served its "First Request for Production of Documents" to Inc. The SEC requested, among other things, "All documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint." The SEC's March 29, 2005 document request was served on counsel for BLACK, and others. Counsel for Inc, complied with the March 29, 2005 Request for Production and provided documents to the SEC.

7. On or about May 19, 2005, Kathryn Pyszka, Senior Trial Counsel for the SEC advised Jennifer Owens, counsel for BLACK, via telephone that the SEC would be issuing an official request for documents from Mr. Black "shortly" as part of the SEC Action.

8. Later in thc day on May 19, 2005, Kathryn Pyszka from the SEC sent a letter to Jennifer Owens via facsimile confirming their telephone conversation from earlier that same day. In this letter, Ms. Pyszka continued that the SEC would be serving an official request for documents on BLACK "shortly." Ms. Pyszda's letter also provided Ms, Owens with a document entitled "SEC Image and Data Delivery Standards" describing the specific format to be used for producing BLACK's documents to the SEC. Govcrnrncnt Exhibit Toronto 18 is a copy of the letter sent by Ms. Pyszka on May 19, 2005.

9. As part of thc SEC proceeding, on or about May 20, 2005, the SEC provided its "First Request for Production of Documents" to counsel for BLACK, by sending, via Federal Express, a written request to BLACK through his counsel. The SEC requested, among other things, "All documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint."

10. On or about March 27, 2001, Hollinger International's proxy statement for 2001 was filed with the SEC by wire from Chicago, Illinois, to Washington, D.C.

11. On or about April 4, 2002, Hollinger International's proxy statement for 2002 was filed with the SEC by wire from Chicago, Illinois, to Washington, D.C.

* * * *

APPENDIX AAA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 737 – June 11, 2007]

UNITED STATES OF AMERICA,	)	
	)	No. 05 CR 727
Plaintiff,	)	Honorable Amy J. St. Eve
vs.	)	
CONRAD M. BLACK, *et al.*,	)	
Defendants.	)	

DEFENDANTS' POSITION PAPER ON USE OF SPECIAL VERDICT FORMS

Defendants, by their attorneys, respectfully offer the following position paper regarding use of special verdict forms.

The government has filed a draft verdict form that, with respect to the mail and wire fraud counts, contains an interrogatory to be completed by the jury in the event of a conviction. A sample of the language in question is as follows:

> If you find the defendant CONRAD M. BLACK Guilty with respect to Count One, you must answer the following question by checking the applicable lines.
>
> With respect to Count One, we, the jury, find the following has been proven beyond a reasonable doubt [check all that apply]:
>
> Defendant engaged in a scheme to defraud International and its shareholders of money or property _____
>
> Defendant engaged in a scheme to defraud International and its shareholders of their intangible right to honest services _____

The government's request that the jury specify the mail/wire fraud theory raises thorny legal issues. At the outset, unlike the Federal Rules of Civil Procedure, there is no authority for a special verdict in the Federal Rules of Criminal Procedure. *See Matthews v. United States*, 485 U.S. 58, 72 n. 3 (1988) (White, J., dissenting).

Moreover, a defendant has a well-established right not to require a properly instructed jury to explain itself beyond rendering a general verdict of guilty or not guilty. *See, e.g., United States v. Townsend*, 924 F.2d 1385, 1413 (7th Cir. 1991) ("We generally do not demand that juries justify their verdicts."). Writing for the Court in *Gaudin v. United States*, 515 U.S. 503 (1995), Justice Scalia explored the historical underpinnings of that right:

> The second difficulty with the Government's position is that it has absolutely no historical

support. If it were true, the law-books would be full of cases, regarding materiality and innumerable other "mixed-law and-fact" issues, in which the criminal jury was required to come forth with "findings of fact" pertaining to each of the essential elements, leaving it to the judge to apply the law to those facts and render the ultimate verdict of "guilty" or "not guilty." We know of no such case. Juries at the time of the framing could not be forced to produce mere "factual findings," but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 591 (1922). *See also* G. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905); Alschuler & Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U.CHI.L.REV. 867, 912–913 (1994). Justice Chase's defense to one of the charges in his 1805 impeachment trial was that "he well knows, that it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries, to decide on the law as well as on the facts, in all criminal cases. This power he holds to be a sacred part of our legal privileges . . . ." 1 S. SMITH & T. LLOYD, TRIAL OF SAMUEL CHASE 34 (1805).

For this reason, it is well-settled that "as a general matter, in criminal cases, the preferable practice is to require the jury to come to one general

verdict as to each count." *United States v. North*, 910 F.2d 843, 910 (D.C. Cir. 1990). Indeed, the Seventh Circuit "has embraced the principle that special verdicts are disfavored in criminal cases because they conflict with the basic tenet that juries must be free from judicial control and pressure in reaching their verdicts." *United States v. Sababu*, 891 F. 3d 1308, 1325 (7th Cir. 1989); *see also United States v. Blackwell*, 459 F.3d 739, 766-67 (6th Cir. 2006); *United States v. Jackson*, 542 F.2d 403, 412-13 (7th Cir. 1976).[1]

At this point, resolution of the government's request for a special verdict seems rather straightforward. There is no authority for a special verdict, and the jury should not be required to explain itself on a matter not directly related to sentencing. Accordingly, the jury should be given general verdict forms as set forth in Exhibit A.

Nevertheless, we are not ignorant of the controversy swirling around the "honest services" prong of the mail/wire fraud statute. While it is the defendants' position that their refusal to acquiesce in an unauthorized act (*i.e.*, a special verdict) could not amount to waiver or forfeiture, we are cognizant that the jury's specification of the mail/wire fraud theory might be helpful to appellate review in the event of a guilty verdict.

---

[1] An exception to this rule exists "when the information sought is relevant to the sentence to be imposed." *United States v. Buishas*, 791 F.3d 1310, 1317 (7th Cir. 1986); *see also United States v. McNeese*, 901 F.2d 585 (7th Cir. 1990).

As an accommodation to the competing interests, the defendants propose bifurcation, *i.e.*, that a special verdict not be given with the main jury instructions, but only be given in the event and after the jury returns a guilty verdict on any mail/wire fraud counts. *See United States v. Riccobene*, 709 F.2d 214, 228 n. 19 (3d Cir. 1983) (dangers associated with special verdict not present where defendants proposed that the interrogatories be given to the jury after it had reached a verdict).

This proposal comes with a necessary legal caveat. For the special verdict form to work in any circumstance, the jury must be instructed that it be unanimous as to the charged mail fraud theories. How else could a special verdict form, either with the main instructions or post-general verdict, work? If the jury is not told at the outset that it must be unanimous in its agreement over money/property and/or honest services, a special verdict at any stage would only result in confusion. If all 12 jurors are not required to agree on a particular theory, then a special verdict on the mail/wire fraud counts would have little value.

In light of the foregoing, defendants propose the following. First, that the jury be given the following unanimity instruction with the main jury instructions:

> Each count of mail or wire fraud in the Information charges that the defendants committed mail and wire fraud in two different ways:
>
> 1. Defendants are charged with mail and wire fraud for participating in a scheme to obtain money or property by means of

materially false pretenses, representations, or promises.

2. Defendants are charged with mail and wire fraud for participating in a scheme to deprive Hollinger International and its public shareholders of their intangible right to the honest services of the corporation's officers and/or directors.

The government need not prove that a defendant committed mail or wire fraud in both of these ways. However, the government must prove that a defendant committed mail or wire fraud in at least one of these ways. You must unanimously agree on which specific way a defendant committed mail or wire fraud.

For example, if some of you find the government proved a defendant committed mail or wire fraud in the first way, and others of you find the government proved a defendant committed mail or wire fraud in the second way, then there is no unanimous agreement. On the other hand, if all jurors agree on the way in which a defendant committed mail or wire fraud, then there is unanimous agreement.

See Seventh Circuit Committee § 4.03 (1999) (modified) (Exhibit B); Court's Revised Instruction 20; *see also United States v. Walker*, 97 F.3d 253, 255 (8th Cir. 1996) (unanimity instruction and special verdict given as to scheme's objects); *cf. United States v. Blumeyer*, 114 F.3d 758, 769 (8th Cir. 1997) (questioning whether a jury is "required to agree on the precise manner in which the scheme violated the

law," but not resolving the issue because the jury was given a unanimity instruction).

Second, it is the defendants' position that the special verdict on the mail and wire fraud counts be bifurcated from the main verdict forms. If the jury announces a guilty verdict on any mail or wire fraud count, it should thereafter be directed to complete the following interrogatory:

> With respect to Count[s] _____, we, the jury, find the following has been proven beyond a reasonable doubt [check all that apply]:
>
> 1. Defendant engaged in a scheme to defraud International and its shareholders of money or property _____
>
> 2. Defendant engaged in a scheme to defraud International and its shareholders of their intangible right to honest services _____
>
> Your decision on either or both of these elements must be unanimous. If you have not reached a unanimous decision on one of these elements, please do not check that line.

Exhibit C.

There is an added wrinkle with respect to Defendant Black. The Court's ruling on Mr. Black's duplicity challenge to the obstruction count, *United States v. Black*, 469 F.Supp.2d 513, 543 (N.D. Ill. 2006), as well as the pattern of racketeering activity in the racketeering count, necessitate special verdicts in the event of a guilty verdict on those counts. If the Court accepts the proposed special verdict procedure with respect to the mail and wire fraud counts, then Mr. Black proposes that the

special verdict forms for the obstruction and racketeering counts follow the same post-verdict procedure, *i.e.*, the jury be asked to answer the verdict interrogatories only if and after it returns a guilty verdict on the obstruction and/or RICO counts.

Respectfully submitted,

/s/ Edward M. Genson
Edward M. Genson
Genson and Gillespie
53 West Jackson Blvd.,
Suite 1420
Chicago, IL 60604
(312) 726-9015
Attorney for Conrad M. Black

/s/ Marc W. Martin
Marc W. Martin
Marc Martin, Ltd.
53 West Jackson Blvd.,
Suite 1420
Chicago, IL 60604
(312) 408-1111
Attorney for Conrad M. Black

/s/ Edward L. Greenspan
Edward L. Greenspan
Greenspan & White
144 King Street East
Toronto,
Canada M5C 1 G3
(416) 366-3961
Attorney for Conrad M. Black

/s/ Patrick A. Tuite
Patrick A. Tuite
Arnstein & Lehr
120 South Riverside Plaza,
Suite 1200
Chicago, IL 65606-3913
(312) 876-7100
Attorney for John A. Boultbee

/s/ Richard A. Greenberg
Richard A. Greenberg
Newman & Greenberg
950 Third Avenue,
32nd Floor
New York, NY 10022
(212) 308-7900
Attorney for John A. Boultbee

/s/ Michael E. Swartz
Michael W. Swartz
Sung-Hee Suh
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000
Attorneys for Mark S. Kipnis

/s/ Ronald S. Safer
Ronald S. Safer
Patricia Brown Holmes
Matthew Mock Schiff
Hardin LLP
233 South Wacker Drive
6600 Sears Tower Chicago,
IL 60606
(312) 258-5500
Attorneys for Mark S. Kipnis

/s/ Michael S. Schachter
Benito Romano
Michael S. Schachter
Ian K. Wochman
Sharon M. Blaskey
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000
Attorneys for Peter Y. Atkinson

CERTIFICATE OF SERVICE

I, MARC W. MARTIN, an attorney for Defendant Conrad M. Black, hereby certify that on this, the 11th day of June, 2007, I filed the above-described documents on the CM/ECF system of the United States District Court for the Northern District of Illinois, which constitutes service of the same.

/s/ Marc W. Martin

APPENDIX BBB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 904 – September 21, 2007]

UNITED STATES OF AMERICA,	)	
	)	No. 05 CR 727
v.	)	
	)	Hon. Amy J. St. Eve
CONRAD M. BLACK, et. al.	)	

GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS FOR JUDGMENT OF ACQUITTAL

* * * * *

A. The Evidence Supports the Jury's Verdict on Counts One and Six

In their post-trial motions, defendants maintain that no rational jury could have concluded that the $5.5 million the top executives collectively received from APC was part of a scheme to defraud International. Furthermore, defendants insist that no reasonable jury could conclude that they were even aware that this money belonged to International. Defendants are mistaken on both

claims. First, whether defendants knew the money was International's or not, the defendants still breached their fiduciary duties to the company by making false and misleading statements to the directors and shareholders about why they were receiving $5.5 million. This was a violation of their duty of honest services, and the jury could reasonably have relied on this violation alone in finding the defendants guilty of fraud with respect to the APC payments. Second, there is record evidence supporting a conclusion that the $5.5 million at issue belonged to International, and defendants knew it. Either way, there is sufficient evidence to support the jury's verdict.

1. Defendants Breached Their Fiduciary Duties

Defendants' arguments concerning the APC payments ignore one of the government's central theories of liability; namely, that defendants breached their duty of honest services to Hollinger International and its shareholders by making false and misleading statements about the nature of the APC payments. Defendants labeled the APC payments as "non-competition payments," rather than bonus compensation (from whatever source), in order to take advantage of the potential tax benefits that genuine non-competition payments received under Canadian tax laws. (Radler Testimony, Tr. 7945-46) To the extent the APC payments were disclosed to International and its public shareholders, the payments were described as "non-competition" payments made "[i]n connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition." (Govt. Ex. Filing-9F) Yet, with respect to the APC payments,

every part of this statement was false: the APC payments were *not* made in connection with any newspaper sale; they were *not* made in 2000 (although the checks were backdated to December 31, 2000); and they were *not* made to satisfy any condition of closing. Finally, the independent directors had *not* "approved the terms of [the APC] payment[]," as shareholders were further told (*id.*), either as non-compete payments or as management fees recharacterized as non-competes for tax purposes.

Thus, even under the defense's best-case scenario, defendants misused their positions at International to create "silly" non-compete agreements and caused the company to make false SEC disclosures in an effort to avoid taxes for senior officers' Ravelston bonus payments. (Rosenberg Testimony, Tr. 9436 (regarding Kipnis's statement that the APC non-competes were "silly")) A reasonable jury could have determined that even if defendants honestly believed that the APC money was nothing more than unpaid management fees, defendants still deprived the company and its shareholders of their right to honest services by making false statements concerning the nature of the payments and the circumstances under which they were paid. In other words, a reasonable jury could conclude that corporate officers and directors abused their positions of trust within the corporation to gain a favorable tax benefit – even if there were no "monetary loss or financial damage" to International. (*See* Govt. Revised Instruction No. 32)[2]

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[2] Defendant Atkinson comes closest of any defendant to raising an issue with the government's breach of fiduciary

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[Footnote continued from previous page]

duty charges. Atkinson maintains that there was evidence at trial – namely the testimony of Professor Li – establishing that "the re-characterization of the APC payments reflected proper tax planning." Atkinson's Br. at 11. Li, however, cautioned that while she was explaining the current state of Canadian tax law, she was "not offering any opinions about fiduciary duties of executives of public companies in the United States." (Tr. 12300) Indeed, Li testified that she had never spoken to Atkinson about her tax opinions before testifying in 2007 (*id.* at 12292), and she knew nothing about the facts of the pending criminal case (*id.* at 12300). If defendants had told the Audit Committee, Board of Directors, or shareholders that they were taking management fees in the form of non-compete payments, and signing non-compete agreements with APC to obtain favorable tax treatment, then the situation might be different. But where, as here, defendants lied to everyone about the money they received, that is fraud.

APPENDIX CCC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 973 – December 10, 2007]

In the Matter of	)	
	)	
UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	No. 1:05-CR-727
v.	)	
	)	Judge Amy J. St. Eve
CONRAD M. BLACK, ET. AL,	)	
Defendants.	)	

DEFENDANT RADLER'S POSITION PAPER AS TO SENTENCING FACTORS

* * * * *

INTRODUCTION

Defendant F. David Radler ("Mr. Radler"), by his attorneys, respectfully submits this Position Paper as to Sentencing Factors. On September 9, 2005, Mr. Radler accepted responsibility for his wrongdoing, and pleaded guilty pursuant to a plea agreement to a count of fraud in violation of 18 U.S.C. §§ 1341, 1346, and 2 (2000). The government and Mr. Radler agreed

that the plea agreement would be governed, in part, by Fed. R. Crim. P. 11(c)(1)(C). The parties agreed that the sentence imposed by the Court would include a twenty-nine month term of imprisonment and a $250,000 fine (the "Agreed Sentence"). (Plea Agreement ¶ 16, attached as Exhibit 1.) The parties agreed that the Court remains free to impose penalties other than the Agreed Sentence that it deems appropriate. (*Id.*)

This memorandum reviews the governing legal standards for sentencing after the United States Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and evaluates the sentencing factors under 18 U.S.C. § 3553(a) (2007). Those factors, including Mr. Radler's extensive cooperation with the government and acceptance of responsibility, favor imposition of the Agreed Sentence. In addition, Section II.C.3.b of this memorandum contains minor factual corrections to the presentence report issued by the Probation Office on November 29, 2007 (the "PSR"). Based on his conduct, as considered in light of the advisory Sentencing Guidelines and the other § 3553(a) factors, Mr. Radler respectfully requests that this Court unconditionally accept his guilty plea and impose the Agreed Sentence.

I. THE GOVERNING LEGAL STANDARDS.

Federal Rule of Criminal Procedure 11(c)(1)(C) governs, in part, Mr. Radler's plea agreement. Rule 11(c)(1)(C) "allows the government and a defendant by their plea agreement to bind a sentencing court, upon acceptance of the guilty plea, to sentence the defendant as the parties agreed." Fed. R. Crim. P. 11(c)(1)(C). If the Court accepts Mr. Radler's plea agreement, under Rule 11(c)(1)(C), it must impose

the Agreed Sentence. *Id.*; *see also United States v. Blinn*, 490 F.3d 586, 587 (7th Cir. 2007); *United States v. Cieslowski*, 410 F.3d 353, 363 (7th Cir. 2005). However, if the Court refuses to impose the Agreed Sentence or otherwise refuses to accept Mr. Radler's plea of guilty, the plea agreement shall become null and void and neither party will be bound thereto. (*See* Plea Agreement ¶ 16.) *See also* Fed. R. Crim. P. 11(c)(5) (defendant has opportunity to withdraw the plea if rejected).

When evaluating a Rule 11(c)(1)(C) plea agreement, sentencing courts consider whether the proposed sentence is "sufficient, but not greater than necessary" to comply with the four purposes of sentencing: (1) reflecting the seriousness of the offense, promoting respect for the law, and providing just punishment; (2) deterrence; (3) protecting the public from further crimes by the defendant; and (4) rehabilitation. 18 U.S.C. § 3553(a)(2) (2007). To make this determination, courts consider the factors listed in § 3553(a), such as the defendant's history and characteristics; the nature and circumstances of the offense; the advisory Guidelines range and applicable downward departures; and the kinds of sentences available, including any need to provide restitution. *United States v. Wachowiak*, 496 F.3d 744, 747-48 (7th Cir. 2007); 18 U.S.C. § 3553(a) (2007). An analysis of how the applicable sentencing factors support imposition of the Agreed Sentence follows.

II. THE SECTION 3553(A) FACTORS FAVOR IMPOSITION OF THE AGREED SENTENCE.

* * * * *

C. Calculation Of The Guidelines Range And Imposition Of A Downward Departure.

* * * * *

4. The Agreed Sentence Appropriately Reflects Mr. Radler's Cooperation And Acceptance Of Responsibility.

Because the Guidelines are now advisory, this Court may impose a sentence below the Guidelines range without resorting to a downward departure analysis. However, to the extent the Court considers the Guidelines range as one of the § 3553(a) factors, the appropriate range must take into account all applicable adjustments to which Mr. Radler is entitled. *See Wachowiak*, 496 F.3d at 749-50. This Court should deviate below the advisory Guidelines range and impose the Agreed Sentence because Mr. Radler has provided substantial assistance to the government in connection with its investigation and prosecution of this case. In addition, the Agreed Sentence appropriately reflects other of Mr. Radler's actions that further demonstrate his acceptance of responsibility and continued efforts to make amends.

In the plea agreement, Mr. Radler agreed to fully and truthfully cooperate with the government for any matter in which he is called on to cooperate, including appearing and providing information in any investigation or other court proceeding. (Plea Agreement ¶ 14.) Mr. Radler also agreed to cooperate with the SEC in connection with any investigation and litigation regarding his conduct, including producing documents and providing information. (Plea Agreement ¶ 14(b).) The plea agreement further provided that, at the time of sentencing, the government would move the Court pursuant to

U.S.S.G. § 5K1.1 to depart from the applicable advisory sentencing Guidelines range and to impose the Agreed Sentence if Mr. Radler had provided full and truthful cooperation. (Plea Agreement ¶ 16.)

On November 9, 2007, the government submitted its Sentencing Position Concerning Mr. Radler ("Government Sentencing Position Memorandum") in which it moved pursuant to § 5K1.1 for the Court to grant a downward departure and to impose the Agreed Sentence.[3] In the Government Sentencing Position Memorandum, the government detailed Mr. Radler's full and truthful cooperation, the substantial assistance he provided to the government in the investigation and prosecution of this case, and how each of the factors enumerated in § 5K1.1 favor a variance below the advisory Guidelines range. The government also explained that it carefully reviewed the full extent of Mr. Radler's cooperation and his trial testimony, and concluded that it continues to believe that the 29-month term of imprisonment is appropriate given that the information and testimony provided by Mr. Radler was accurate and complete in all respects. Mr. Radler respectfully requests that the Court grant the government's § 5K1.1 motion given the circumstances present here.

Moreover, the Agreed Sentence appropriately reflects additional of Mr. Radler's actions, beyond his guilty plea and cooperation with the government, that demonstrate his acceptance of responsibility. For example, Mr. Radler's extensive efforts to make timely and comprehensive restitution at significant

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[3] The Government Sentencing Position Memorandum is incorporated herein by reference.

personal expense exemplify his acceptance of responsibility.[4] Mr. Radler has repaid all of the monies relating to the personal non-compete payments at issue in this case with interest, $8.65 million, and other monies relating to many transactions for which he was not charged, another $44 million. The quantum of his total $53 million of personal repayments is 165% of the total loss amount recommended in Mr. Radler's PSR and is 8.7 times greater than the $6.1 million total loss amount recommended by the Probation Office in his co-defendants' Presentence Reports (or 869% of $6.1 million).

In addition, Mr. Radler also encouraged his affiliated companies to settle with International, which resulted in repayment of an additional $8.6 million to International. (*See* Radler Supporting Memorandum at 4.) He also used his own funds to fight an injunction in Canada that made it difficult, if not impossible, for Mr. Radler to transfer his assets to the United States in order to fund his settlements with Hollinger International and the SEC and to make full restitution. (*See id.* at 5-7.) Further, Mr. Radler has cooperated with International and its shareholders in connection with its litigation in the United States and Canada, which shows his desire to continue to make amends to the

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[4] Please see Mr. Radler's November 9, 2007 brief supplementing the Government Sentencing Position Memorandum for a full discussion of his restitution efforts (the "Radler Supporting Memorandum"). (Dkt. No. 945.) The Radler Supporting Memorandum is incorporated herein by reference.

victim of his misconduct. (*See, e.g.*, Government Sentencing Memorandum at 14 n.8.)

For all of the reasons set forth above, in the Government Sentencing Position Memorandum, and in the Radler Supporting Memorandum, Mr. Radler respectfully submits that the Agreed Sentence appropriately reflects his full and prompt cooperation with the government in connection with its ongoing investigation of his co-defendants, and his affirmative and continued acceptance of responsibility.

* * * * *

Dated: December 10, 2007

Respectfully submitted,

F. DAVID RADLER

By: s/ Anton R. Valukas
One of His Attorneys

APPENDIX DDD

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[R. 1027 – January 29, 2008]

UNITED STATES OF AMERICA,	)	
	)	No. 05 CR 727
v.	)	
	)	Hon. Amy J. St. Eve
CONRAD M. BLACK, et. al.	)	

GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS FOR RELEASE PENDING APPEAL

* * * * *

II. None of the Issues Raised by Defendants Is a Substantial Question Likely to Result in Reversal, a New Trial or a Reduced Sentence.

* * * * *

B. Honest Services

* * * * *

Atkinson raises the separate, but equally flawed, argument that the evidence of an honest services fraud was insufficient because the government did not prove that defendants' gain was at the expense of International. Atkinson makes much of what he calls the government's "Relabeling Theory" – referring to the argument that even if the APC non-compete monies were relabeled management fees, defendants still deprived International of their honest services – and argues that this cannot be a basis for finding defendants guilty, because in that scenario the alleged victim, International, has not suffered any detriment. Atkinson hinges his entire argument (Atkinson Br. at 4) on one sentence from *United States v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003), stating that an honest services fraud involves "a scheme to misuse [a] fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed." Atkinson's argument is wrong for at least four reasons. First, the language quoted from *Hausmann* cannot possibly mean what Atkinson wants it to mean: namely, that an honest services fraud must involve a pecuniary loss to the victim who is owed the fiduciary duty. If that were the case, there would be no need for an honest services theory of fraud because every Section 1346 violation would also be a theft of money or property. The whole point of Section 1346 is that Congress rejected the Supreme Court's reasoning in *McNally*, that mail and wire fraud require a theft of money or property, and instead provided for a mail and wire fraud violation even if there is no pecuniary loss to the victim.[6]

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[6] The facts of *Hausmann* make this plain. In

Second, if Atkinson's argument is that the loss need not be pecuniary, but there must be some evidence that the scheme was at the victim's expense, that standard has more than been met in this case. International lost the honest services of its senior executives who violated internal controls for the review and approval of related-party transactions and caused the company to file false public filings with the SEC, all in the service of their interest in receiving tax-free bonuses. The consequences for International included, *inter alia*, exposure to shareholder liability and SEC fines for filing false disclosures. Because this aspect of the fraud involved the misuse of their positions as senior executives of the company to create false non-compete agreements and disclosures for private gain to themselves and their co-schemers, it fits squarely within this circuit's clearly established precedent interpreting Section 1346.

Third, International did suffer a pecuniary loss as a result of defendants' fraud, even if defendants somehow believed the APC non-competes were simply management fees being relabeled as non-

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[Footnote continued from previous page]

Hausmann, a personal injury lawyer made side deals with a chiropractor to receive kickbacks for every client he referred. The clients did not pay any more for the medical services, they were just lied to about their lawyers financial interest in the referrals. The defendant made a similar claim to that raised by Atkinson, arguing that no harm resulted to his clients, who were deprived of nothing to which they were entitled. The court rejected this reasoning, because it "ignores the reality that Hausmann deprived his clients of their right to know the truth about his compensation." *Id.* at 957.

competes to receive favorable tax treatment. Even under those circumstances, defendants unilaterally decided to take those tax savings for themselves rather than giving them to or even sharing the savings with International, the company to which they owed a fiduciary duty of loyalty that required them to put the company's interests ahead of their own.

Fourth, by parsing out the transactions and focusing exclusively on Radler's testimony regarding the source of the APC funds, Atkinson's argument entirely ignores all the other evidence at trial regarding the various non-compete agreements and defendants' efforts at concealment, from which the jury could reasonably conclude that the APC payments were part of a larger scheme to divert money from International to the top executives through fraudulent non-competes and to misuse their positions at the company to perpetrate the fraud.

Finally, even if the Court were to conclude that the honest service issues raised by defendants presented a substantial question, there is no basis for the Court to find it is likely to result in reversal or a reduced sentence. Any error in the instructions regarding the honest services theory would likely be deemed harmless, because the evidence at trial established, and the jury's guilty verdicts could just as likely have been based on, defendants' property fraud. Defendants do not even suggest that the instructions on the property fraud were flawed. Indeed, the jurors were given the Seventh Circuit's pattern instructions defining the elements of mail and wire fraud involving a theft of money or property. R. 771 at 21. Defendants' argument is

based on the faulty assumption that a finding of insufficient evidence or error on either the honest services theory or the property fraud theory would require reversal. In support of this claim, Atkinson cites *Yates v. United States*, 354 U. S. 298 (1957), for the proposition that if either mail fraud theory were undermined on appeal, the general verdict would have to be reversed. Defendants fail to acknowledge, however, that *Yates* has been narrowly construed to apply only in circumstances where one of two bases for conviction has been found legally invalid. *See Griffin v. United States*, 502 U.S. 46 (1991). If instead the issue is the sufficiency of the evidence, a court will not reverse the conviction simply because one of the bases for the general verdict was not supported by sufficient evidence, but instead will assume that the jury based its verdict on the alternative basis that is supported by the evidence. *Id.* at 56-58.

Perhaps more significantly, as the Court is well aware, the government sought, and defendants were given the option of having, a special verdict form that would have directed the jurors in the event of a conviction on any of the fraud counts to specify whether they found the particular defendant guilty of mail or wire fraud based on a property theory or honest services theory of fraud. As the court of appeals has noted, "[s]pecial verdicts avoid the Yates problem, because the court then can be confident that the facts as the jury believed them to be are a legally proper basis of conviction." *Tenner v. Gilmore*, 184 F. 3d 608, 612 (7th Cir. 1999). After substantial deliberation and discussion before the Court on this issue, defendants decided that they did not want to have a special verdict and elected to have a general verdict on the mail and wire fraud counts. Tr. 13522-

23. Defendants thus waived any opportunity to argue on appeal that legal error in the government's honest services theory requires reversal of the general guilty verdict on Counts One, Six or Seven. *See United States v. Wilkinson*, 754 F.2d 1427, (2nd Cir. 1985) (finding that defendant waived argument under Yates where defendant "objected to the government's proposal that the jury render a special verdict"); *United States v. Drebin*, 557 F.2d 1316, 1333 (9th Cir. 1977) (Defendant "objected to the use of special verdicts and thereby waived any objections to use of the general verdict").

* * * * *

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUL 30 2009
OFFICE OF THE CLERK

No. 08-876

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONERS

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
Counsel for Petitioner Kipnis

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100
Counsel for Petitioner Black

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

BOTH 4WQ2C9

MICHAEL E. SWARTZ
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000
Counsel for Petitioner Kipnis

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" under the mail and wire fraud statutes to include a scheme or artifice to "deprive another of the intangible right of honest services," applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed.

2. Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

PARTIES TO THE PROCEEDING

The three petitioners were defendants in the district court. Co-defendant Peter Y. Atkinson, who was also an appellant in the Seventh Circuit, is not a party before this Court. F. David Radler and The Ravelston Corporation Limited—a privately held Canadian corporation—were defendants in the district court but entered into plea agreements with the government before trial. They were not parties in the Seventh Circuit and also are not parties before this Court.

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-17a) is published at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered June 25, 2008. A petition for rehearing was denied August 13, 2008. Justice Stevens extended the time within which to file a petition for a writ of certiorari until January 10, 2009. The petition was filed on January 9, 2009, and granted on May 18, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341, part of Chapter 63 of Title 18 of the United States Code, provides in its entirety:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by

the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

18 U.S.C. § 1346, also found in Chapter 63, reads in its entirety:

"For the purposes of this Chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

STATEMENT

In a lengthy set of criminal charges that the jury overwhelmingly rejected, the government accused petitioner Conrad M. Black and his co-defendants of treating the public company of which they were officers as Black's personal piggy bank from which he siphoned off money to support a lavish lifestyle, principally through payments made under allegedly bogus non-competition agreements arising from transactions between the company and third parties.

While petitioners' alleged theft of money or property from their employer was the government's principal theory of mail fraud, the government was not content to rest on that allegation alone. Instead, the government successfully insisted on a jury instruction permitting conviction for mail fraud on the alternative theory that petitioners deprived the company or its shareholders of the "intangible right of honest services."

After a four-month trial, the jury acquitted petitioners on nearly all counts, soundly rejecting the government's principal theory of prosecution—that petitioners "stole money and property from the company" through non-competition agreements associated with the company's sale of its community newspapers to other companies. J.A. 228a. Petitioners were instead convicted on just three of the mail fraud counts. The jury instructions on mail fraud did not require the jury to find that petitioners caused even a *risk* of economic harm to the company in order to convict them of depriving the company of its "intangible right of honest services." Instead, the jury was allowed to convict under those instructions even if it found, consistent with testimony from the government's primary witness, that petitioners sought a lawful tax benefit in another country, with no contemplated detriment to their employer, but in the process fell short of complying entirely with their Delaware-law duty of loyalty to the company.

That anyone could even consider such conduct to be a federal crime, punishable by up to twenty years in prison and a predicate for money laundering and racketeering charges, is the unfortunate consequence of Congress's decision some twenty years ago to expand the definition of a scheme to defraud to include

the vaguest of terms: encompassing any plan to deprive another of "the intangible right of honest services." The government has stretched this malleable phrase, unknown in the common law, far beyond the public corruption context that gave rise to its enactment, treating the statute as "nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). The convictions here, after the government's primary witness completely undermined the government's principal theory that petitioners fraudulently schemed to obtain money or property, are reason enough to place predictable and intelligible limits on an ambiguous theory of criminality that has bedeviled the lower courts for two decades.

1. Petitioners were executives of Hollinger International, Inc. (Hollinger), a publicly held Delaware company that owned and operated several large newspapers and hundreds of smaller publications. Petitioner Black was Hollinger's Chairman and CEO. Petitioner John A. Boultbee was its Executive Vice President, and, for a time, its Chief Financial Officer. Petitioner Mark S. Kipnis was the Corporate Counsel, Secretary and Vice President of Law.[1]

Hollinger's roots were in Black's and co-defendant David Radler's acquisition in 1969 of a single Canadian newspaper, the *Sherbrooke Daily Record*. J.A. 130a-132a. (Radler, President and Chief Operating Officer of Hollinger, agreed to testify

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[1] Co-defendant Peter Y. Atkinson, also convicted at trial, was Vice President of Hollinger.

for the government in exchange for leniency, and was the star witness for the prosecution.) Under their successful management, Hollinger ultimately purchased hundreds of community newspapers, as well as several national and other large newspapers. These included the *Jerusalem Post*, *The Chicago Sun Times*, and the *Daily Telegraph* of London, as well as the launching of the *National Post* in Canada. *Id.* at 161a-180a. Under Black's leadership over nearly two decades, the *Telegraph* alone enriched Hollinger and its shareholders to the tune of hundreds of millions of dollars. *Id.* at 163a-168a. Black built Hollinger's international newspaper empire from a mere $20,000 in equity to market capitalization well in excess of $1 billion. *Id.* at 180a.

Black and Radler managed the business through their combined majority ownership interest in Ravelston Corp. Ltd., a private Canadian company. Ravelston, in turn, had a controlling interest in Hollinger, Inc., a holding company that controlled Hollinger through a super-majority of voting shares.[2] Consistent with the management structure, Hollinger typically did not pay petitioners or Radler directly. Instead, Ravelston usually compensated them from the management fees that Hollinger's board of directors approved for payment to Ravelston.

Beginning in the late 1990s, Hollinger's board approved Black's proposal to divest the company of

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[2] In the district court, Hollinger International was often referred to as "International." We follow the shorthand used by the court of appeals, referring to Hollinger International as "Hollinger."

most of its smaller newspapers based on his prescient prediction that the Internet would adversely affect print media. Although Black's strategy proved to be an enormous financial success for Hollinger and its shareholders, the government came to believe that the transactions implementing this legitimate business plan were somehow criminally tainted. In the government's view, petitioners plotted to steal from Hollinger by causing companies purchasing Hollinger's newspapers to divert to petitioners and others part of the purchase price under bogus covenants not to compete.[3]

Petitioners' straightforward defense—that the non-competition agreements were legitimate—was amply supported by even the government's proofs. Most of the agreements had been included as part of Hollinger's deals with sophisticated purchasers who quite understandably had no desire to risk competition from the executive team that had successfully built Hollinger into an international media empire. The jury returned acquittals on all counts related to non-competition agreements signed in these third-party deals. One particular set of agreements, not directly connected to a newspaper sale, resulted in two of the three mail fraud convictions. These agreements—which, unlike the earlier non-competes, restricted Black, Boultbee, and others from competing with Hollinger and its affiliates after leaving Hollinger—minimized the tax burden of the Canadian defendants.

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[3] Kipnis, the corporate counsel, was neither party to, nor paid under, the covenants. Instead, the government charged that his legal services in preparing the paperwork aided and abetted the scheme to defraud.

Under then-applicable Canadian law, payments received pursuant to non-competition agreements were non-taxable, even if the payments were in lieu of other income the payees might have received, so long as the payees were legally bound by the non-competes, which indisputably was the case here. In order for the Canadian defendants to obtain the benefit of the favorable Canadian tax ruling *without* imposing any cost or other detriment on Hollinger, Radler simply caused some of the management fees that otherwise would have been paid by Hollinger to Ravelston (and, in due course, by Ravelston to the various officers) to be re-characterized as non-compete payments made directly to those officers.

The government attempted to anticipate petitioners' defense by alleging in the original indictment that petitioners had schemed to defraud not only Hollinger, but also the Canadian fisc. Before trial, however, the government abandoned its "fraud on Canada" theory of mail fraud, and filed a superseding information deleting Canada as an alleged victim. Pet. App. 24a-92a. Notably, the information, like the preceding indictment, did not stop at alleging a scheme to *steal money* from Hollinger. Lacking enough confidence in its "looting" allegations to rely on them alone, the government further alleged that petitioners' supposed scheme *also* "fraudulently deprived [Hollinger] International of its right to receive their honest services." Pet. App. at 36a-37a. Again and again, the information invoked petitioners' state-law duty of "loyalty" and alleged that petitioners breached that "fiduciary duty" to Hollinger. *E.g.*, *id.* at 52a, 25a-34a.

2. Petitioners' defense included *uncontradicted* expert testimony establishing that the re-

characterization of management fees as non-compete payments was entirely proper under Canadian law. Pet. App. 142a-148a.

Significant parts of the government's own case bolstered petitioners' defense. For example, of the three fraud counts on which petitioners were convicted, the two involving the most substantial transaction accused petitioners of improperly taking $5.5 million from American Publishing Company (APC), a Hollinger subsidiary that had owned most of Hollinger's U.S. newspapers. Petitioners pointed out that the $5.5 million payment was part of a larger amount that the Hollinger board had approved for services received under Hollinger's management agreements with Ravelston. APC and dozens of other Hollinger subsidiaries routinely paid such management fees to Ravelston, on Hollinger's behalf and in proportionate shares, with the express approval of Hollinger's audit committee. J.A. 159a-160a, 181a-186a, 189a-190a. Radler—the government's star witness, the President of APC, and the man who devised the APC non-competition agreements—*agreed with petitioners on this point*. *Id.* at 182a-183a.

Radler's testimony supporting petitioners' defense that they neither intended nor contemplated harm to Hollinger was hardly a surprise to the government. Radler testified unequivocally in the grand jury, on direct examination for the government as its main witness at trial, and again on cross examination, that the $5.5 million *was* part of the overall annual management fee amount that the board had *already* approved. J.A. 159a-160a, 181a-183a, 188a-189a. Radler also testified that it was he who tied payment of the $5.5 million to non-compete agree-

ments, signed by Black, Boultbee, Radler and Atkinson. *Id.* at 153a, 157a. Those agreements barred the four officers from competing with any publication owned by *any affiliate* of APC (including Hollinger itself) for three years after their departure from Hollinger. *E.g.*, Pet. App. 156a-163a (Noncompetition Agreement).[4]

In particular, Radler testified that the $5.5 million was part of a *larger* amount *previously* approved by the audit committee. *Id.* at 182a. Because the payments were owed and originally approved as management fees, it was of no legal significance whether the board would have agreed to pay the $5.5 million solely in exchange for non-compete promises. Nor is it surprising that these payments were handled unlike the *other* management fee payments that the board approved. The payments needed to be characterized as non-compete payments, rather than compensation, Radler explained, to satisfy the Canadian tax rules. J.A. 157a. The government was reduced to arguing to the jury that its most important

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[4] The government has repeatedly mischaracterized the agreements as preventing competition with only *APC*'s holdings—which by then included just one small newspaper in Mammoth Lake, California. Opp. 2-3; Govt C.A. Brief 14, 17, 49, 87. And it continued to do so even after petitioners pointed out the language in the agreements that prevented competition with publications owned by APC *affiliates* too. Appellants' Brief 41-42; Pet. App. 158a-159a (noncompetition provision of APC noncompetition agreement). When the agreements were signed, Hollinger itself owned approximately 100 newspapers in the greater Chicago area alone. J.A. 193a-194a; DX JB Newspapers 1.

witness—and the person in the best position to know—was flat-out wrong.[5]

The other fraud conviction (count 7) arose out of Hollinger's sale of newspapers to Forum Communications and Paxton Media Group ("Forum/Paxton"). According to Radler's contemporaneous documentation, the purchasers demanded non-competition agreements with individual officers as part of the purchase. J.A. 374a-375a. Hollinger board member Richard Perle co-signed Executive Committee Consents specifically approving the execution of non-compete agreements by Hollinger and the officers. *Id.* at 382a-387a. The board then unanimously approved and adopted these Consents. *Id.* at 367a-368a. Petitioners did not learn until much later that, due to oversight and notwithstanding the approvals, the individual non-compete agreements were never drafted. The payments were therefore made without written agreements in place.

Radler himself testified that he believed non-competition agreements had been prepared for the Forum/Paxton transactions. Moreover, Radler explained that $600,000 was allocated from the Forum/Paxton reserve to make payments under the

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[5] The government attempted, to no avail, to contradict its own witness and, on appeal, went so far as to assert, for the very first time, that Radler had *perjured* himself in the grand jury and at trial when he testified that the payments had been authorized (Govt. C.A. Brief at 36). This, after the government's *post-trial* representations that Radler deserved a lenient sentence because "the information and testimony" he provided "was accurate and complete *in all respects*." J.A. 445a-446a (Radler sentencing memorandum agreeing with government's sealed motion) (emphasis added).

non-competes because Radler "thought the money had been set aside" for that purpose. *Id.* at 142a.

3. Throughout summation the government emphasized that its two theories of fraud—theft of money and honest-services fraud—operated independently. The prosecutor reminded jurors that while "one of the theories behind this fraud" was that petitioners "stole money and property from the company," "[t]here's also a second theory" that "has to do with something called honest services." J.A. 228a. The prosecutor added that "[s]tealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious." *Id.* In urging conviction under this second theory, the government elicited—and emphasized in summation—testimony that petitioners violated state-law fiduciary duties as officers of a Delaware public company. *See, e.g.*, *id.* at 108a-111a, 118a-120a, 222a-223a, 229a, 233a-240a.

Consistent with the case law of several other circuits, petitioners sought an instruction that "[i]n order to prove a scheme to defraud, the government must prove that it was reasonably foreseeable to the defendant that the scheme could result in some economic harm to the victim." Pet. App. 187a. The government sought an instruction exactly to the contrary: "In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable financial harm to the victims." *Id.* at 193a; J.A. 284a. Acknowledging that case law on honest-services-fraud from a number of other circuits was "contrary" to its position, the government insisted that under Seventh Circuit precedent "we don't have to show fore-

seeable harm." Pet. App. 208a. The government withdrew its proposed instruction only after the judge rejected *petitioners'* proposed instruction as inconsistent with the law of the circuit. The government reserved the right to renew its request if petitioners so much as "suggest[ed]" to the jury a need to find there was any "foreseeable harm" to Hollinger. *Id.*

As a result, the judge instructed the jury that the "scheme to defraud" could be *either* a scheme to "obtain money or property" from another *or* a failure by petitioners to render "honest services" to Hollinger. J.A. 335a. To convict on the honest-services theory the jury could put aside the allegations of theft and instead find that the petitioner "misused his position for private gain for himself and/or a co-schemer" and that he "knowingly and intentionally breached his duty of loyalty" under Delaware corporate law. *Id.* at 335a-336a. That duty required "act[ing] in the corporation's best interests," which the instructions equated with being "entirely fair" to the corporation. *Id.* at 336a. The jury could not deem a transaction "entirely fair" without concluding that it resulted from a "fair process." *Id.* at 336a-337a.[6]

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[6] On the "intent to defraud" element of mail fraud, the jury needed to find only an "intent to deceive or cheat Hollinger * * * in order to cause a gain of money or property to the defendants or others; and the potential loss of money or property to another; *or*, to deprive the corporation and its shareholders of their right to the honest services of their corporate officers." J.A. 338a (emphasis added). Not considering this last alternative to have sufficiently watered down the intent element, the government also insisted on an "ostrich instruction," even though any finding under one would seemingly be at odds with the requirement of specific intent. Tr 15187-88.

The jury therefore was permitted to return guilty verdicts on the fraud counts even after rejecting the government's main theory—that petitioners stole money from Hollinger. The jury could convict even if it accepted the testimony of the *government's* principal witness and concluded that Hollinger faced *no risk* of pecuniary harm. Indeed, it could convict even if jurors agreed with the defense that the petitioner-payees only "benefited" to the extent of paying lower Canadian taxes, a benefit that was *not* at Hollinger's expense.

The prosecution suggested that the jury be required to deliver "special verdicts" identifying, in the event of conviction, the theory of fraud it had accepted. When petitioners argued that special verdicts would infringe on their Sixth Amendment rights and were incompatible with the Seventh Circuit's rejection of a unanimity requirement on the theory of fraud, the prosecution advised the court that it had no objection to general verdicts. Pet. App. 228a. With that concession, the court—which had already declined petitioners' offer to use *post*-verdict interrogatories instead of special verdicts—had no reason to consider whether special verdicts would have been an appropriate exercise of discretion under these facts. *Id.* ("THE COURT: General form. Okay.").

The jury acquitted petitioners on all but three of the twelve fraud counts it considered—necessarily rejecting the government's sweeping claims that petitioners had embarked on a massive scheme to loot

Hollinger.[7] The jury also acquitted all petitioners of several tax charges, and it further acquitted Black of a RICO charge (for which every predicate act was mail fraud, wire fraud, or transportation of money taken by fraud).

The jury convicted Black of a single additional count charging obstruction of justice for conduct in Toronto, Canada. The charge stemmed from Black's response to a call from his assistant, who had decided to move Black's personal papers and effects during regular business hours from their office to her home, where she was setting up a new office in advance of imminent eviction by Hollinger's new management. J.A. 199a-202a. The government speculated that Black moved his belongings upon word he would soon be receiving a document request from the SEC in Chicago. J.A. 240a-241a. Not only was it the SEC's *sixth* document request, the evidence showed without contradiction that Black learned of it only *after* the materials were moved. Moreover, on each of the other five occasions Black had given several lawyers free rein over both his office and home (where he ended up taking the materials after responding to his assistant's call), producing over 110,000 pages in response. J.A. 196a-197a, 423a-428a. The key issue on the obstruction count was whether, by moving these documents, Black merely proceeded as any tenant would at the end of his tenancy or, instead, acted "corruptly"—with the "improper purpose" of "subvert[ing] or undermin[ing]

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[7] The government withdrew its money laundering charge against Black before the case went to the jury, and the court granted Kipnis's post-verdict motion for judgment of acquittal on count 7.

the fact-finding ability of an official proceeding" looking into whether he had engaged in fraud. J.A. 342a-343a.

4. The court of appeals affirmed petitioners' convictions. Although the jury was instructed on two *alternative* theories of fraud, and petitioners challenged the *legal adequacy* of one of those two alternatives (the honest-services instruction), the court focused much of its analysis on the *factual sufficiency* of the government's evidence on the *other* theory—that petitioners wrongfully took Hollinger's money. Because the court believed that the government introduced legally sufficient evidence from which a jury *could* have found a "money fraud," it assumed the jury *did* find such a fraud despite the flawed honest-services instruction that permitted a guilty verdict even if the jury rejected the "money fraud" charge. Pet. App. 3a-5a, 10a.

The court acknowledged that "all [the jury] had to find to support a conviction for honest services fraud was that the defendants had deliberately failed to render honest services to Hollinger and had done so to obtain a private gain" (Pet. App. 5a-6a), but it rejected petitioners' argument "that for the statute to be violated, the private gain must be at the expense of the persons (or other entities) to whom the defendants owed their honest services." *Id.* at 6a. The court emphasized that "[t]he defendants do not deny that they sought a private gain" in the form of lower Canadian taxes, and on that basis dismissed their position as a "no harm-no foul argument." *Id.* at 6a. And although the court disclaimed any intention to impose on "every corporate employee" a duty to "advise his employer of his tax status," it speculated nonetheless that Hollinger's audit committee might

have renegotiated the management fees owed to Ravelston if the committee had only known of the extent to which some of the individuals could benefit from Canadian tax rules. This demonstrated, in the court's view, "how honest services fraud bleeds into money or property fraud." *Id.* at 8a-9a.

Finally, the court ruled that "[e]ven if our analysis of honest services fraud is wrong, the defendants cannot prevail." *Id.* at 9a. It reasoned that the error was "harmless" because the "government's honest services theory" was that petitioners abused their positions "to line their pockets with phony management fees disguised as compensation for covenants not to compete," and, in any event, petitioners "forfeited their objection" to the honest services instruction by declining when "the *government* requested a verdict that would require the jury to make separate findings on money or property fraud and on honest services fraud." *Id.* at 10a-11a (emphasis added). The court imposed this new forfeiture theory of harmless error without citation to authority.

SUMMARY OF ARGUMENT

I. This Court held in *McNally v. United States*, 483 U.S. 350 (1987), that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to honest and impartial government. Under the "intangible rights" theory that this Court rejected in *McNally*, "a public official owe[d] a fiduciary duty to the public, and misuse of his office for private gain [was] a fraud." *Id.* at 355. As the Court explained, the indeterminacy and inherent ambiguity of this theory ran afoul of the rule that "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.'" *Id.* at 360

(quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," the Court therefore limited the mail fraud statute "to the protection of property rights." 483 U.S. at 360. "If Congress desires to go further," the Court concluded, "it must speak more clearly than it has." *Id.*

Congress's response—Section 1346—failed to do the one thing that this Court asked. Far from speaking clearly, the statute is a model of vagueness. In a single sentence, it enjoins against "depriving another" of the "intangible right of honest services." No one who is not a federal prosecutor believes that a deprivation of "honest services," by itself, adequately and clearly describes an offense with the specificity required by the Constitution. Instead, the lower courts have construed this language merely as a direction to revive the body of case law that antedated *McNally*.

This approach effectively licenses prosecutors to target anything that offends their ethical sensibilities, especially when the defendant is likely to generate career-building headlines, so long as they can pick and choose from the smorgasbord of pre-*McNally* authority some arguably analogous prosecutions. For the last two decades, the lower courts have parsed these cases—accepting some while rejecting or qualifying others—to develop, in violation of longstanding authority, *see United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), a body of common law federal "crimes" that no reasonable person could anticipate.

The effort to interpret Section 1346 based on pre-*McNally* cases is particularly indeterminate where, as here, purely *private* conduct is at issue. The applicability of the intangible rights doctrine to the private sector was far from uniformly established in 1987. To be sure, the intangible rights theory had been applied to private conduct in a few cases where employees had accepted kickbacks, sold confidential information, or defrauded the victim of a right to privacy. *See McNally*, 483 U.S. at 362-64 & nn. 3, 4 (Stevens, J., dissenting). But compared to the larger body of public corruption cases, the doctrine was embryonic. Indeed, in *McNally* itself the Sixth Circuit had held that "misconduct of a fiduciary in the administration of exclusively private matters in his capacity as a private individual"—the type of misconduct alleged here—was "not actionable as a violation of the mail fraud statute under an intangible rights theory." *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986).

Whatever the precise scope of Section 1346, it is clear that petitioners' convictions must be reversed because the district court refused to instruct the jury on the *one* requirement that is apparent from the text and history of the statute. Section 1346 does not define a free-standing crime, but merely provides that the "schemes to defraud" previously proscribed by the mail fraud statute now "include" schemes "to deprive another of * * * honest services." That language precludes prosecutions for allegedly "dishonest" conduct outside the common understanding of "fraud." That understanding, as was clear in the lower courts before *McNally*, has always required the government to establish that a defendant contemplated that the victim suffer some identifiable economic injury.

Although Section 1346 was enacted with little significant debate, the sparse legislative history confirms this conclusion. In the pre-*McNally* cases of which the statute's sponsors were aware, the defendant's conduct created a foreseeable risk of economic harm to those who purportedly were the victims under an honest services theory. Indeed, the requirement that "the defendant intended or contemplated loss" to the victim was expressly set forth in one of the bills introduced to "overrule" *McNally*, and it was the holding of *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), a case mentioned repeatedly in the legislative record as authority for that requirement.

In *Lemire*, the District of Columbia Circuit had decisively rejected the government's bid to "criminalize any intentional undisclosed breach of duty to an employer." *Id.* at 1336. Because "[e]mployee loyalty is not an end in itself" but "a means to obtain and preserve pecuniary benefits," the court joined the Second Circuit in holding that "[t]here must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.* at 1337 (citing cases); *see also id.* at 1338 ("Under our standard for wire fraud, the jury would have had to find that the defendants' failure[s] to disclose * * * were in furtherance of a scheme to defraud [the victim] of a business opportunity or economic benefit").

This Court should interpret Section 1346 in keeping with the understanding reflected in *Lemire* because the government's alternative reading gives rise to serious constitutional questions of separation of powers, federalism and due process. The rule of lenity also strongly counsels in favor of that more limited reading. As this Court recognized in

Cleveland v. United States, 531 U.S. 12, 25 (2000), it is especially important to construe the mail and wire fraud statutes with federalism and lenity firmly in mind, because (as occurred here) those statutes are oft-used predicates for draconian RICO and money laundering charges.

The government argued below that none of this really matters, because—it still maintains—the honest services theory was merely another label for its "money fraud" theory. Opp. 4, 15. But the jury was given two *distinct* theories on the fraud counts, and the government insisted on the honest-services alternative, predicated on supposed violations of Delaware corporate law, so as to give the jury a basis for convicting *apart from* theft. As this Court recently reaffirmed in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008), "a conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." Such error is harmless only if the government can negate, beyond a reasonable doubt, the possibility that the error influenced the jury's verdict. *Yates v. United States*, 354 U.S. 298 (1957); *Neder v. United States*, 527 U.S. 1 (1999).

The Seventh Circuit misapplied these precedents, speculating instead that the jury might have convicted anyway if properly instructed. Pet. App. 10a. Apart from invoking the wrong legal standard, this is a most implausible assertion, given the jury's spectacular rejection of the bulk of the government's fraud case. The obstruction conviction also must be reversed, because the erroneous instructions and substantial inflammatory evidence on those counts could not help but prejudice the jury's decision whether Black acted with a corrupt intent—a point

the government waived by not contesting it when opposing certiorari.

II. The court of appeals alternatively concluded that petitioners were barred from showing that they were wrongfully convicted because they declined the government's suggestion that the jury deliver special verdicts. This heavy sanction is nowhere to be found in the rules for preserving instructional error. In fact, there is no provision in the criminal rules for special verdicts at all. Petitioners complied with the requirements that do exist, and the lower court was without authority to create new ones, especially when it announced the rule, and then punished an earlier failure to "comply" with it, in the same ruling.

Even if courts had the power to alter the federal rules through ad hoc decision-making, the judicial amendment imposed here is a particularly poor candidate. The court held that criminal defendants may be presented with a Hobson's choice: accept a special verdict form, a tool that the courts overwhelmingly view as "a disfavored procedure" that invades the defendant's basic right to a fair trial, 26 MOORE'S FEDERAL PRACTICE: CRIMINAL § 631.03[1] (3d ed. 2008), or lose the right to show that they were convicted of engaging in innocent conduct. If such a choice could ever be imposed, it must be accomplished in accordance with established mechanisms for prospective rule-making.

ARGUMENT

I. SECTION 1346 MAY BE APPLIED TO PRIVATE SECTOR RELATIONSHIPS ONLY IF THE JURY FINDS THAT DEFENDANTS CONTEMPLATED ECONOMIC HARM TO THE PARTY TO WHOM "HONEST SERVICES" WERE OWED

Section 1346 of Title 18 defines the "scheme[s] to defraud" that are punishable under the mail and wire fraud statutes to "include[]" schemes "to deprive another of the intangible right of honest services." The principal question in this case is whether a mail fraud charge based on a private individual's alleged scheme to defraud a private entity of "honest services" can be sustained without a jury finding that the defendant contemplated some identifiable economic harm to the victim. The Seventh Circuit rejected any such requirement in this case, believing that it is sufficient for conviction that a defendant failed to comply with Delaware rules of corporate governance and received a "benefit" in the form of a *lawful* tax break in a foreign country—*i.e.*, a "benefit" that was not *at the expense* of the supposed victim. Indeed, petitioners likely stand convicted of mail *fraud* under federal criminal law merely because, in the estimation of the jury, their dealings with their employer were not "entire[ly] fair" under Delaware corporate law.

A majority of the courts of appeals that have considered the question, however, have concluded that Section 1346 may be applied in private sector cases only if the jury is required to find that the defendant contemplated some identifiable economic harm *to the victim*—that is, to the party to whom the duty of "honest services" was owed. In keeping with the reasoning of *Lemire*, 720 F.2d at 1327, a leading pre-

McNally case from the D.C. Circuit, the majority rule "construe[s] the intangible right to honest services in the private sector as ultimately dependent upon the property rights of the victim." *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997); *United States v. Vinyard*, 266 F.3d 320, 328 (4th Cir. 2001) (adopting *Frost*); *United States v. deVegter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999) (adopting "well-reasoned standard[s]" of *Frost* and *Lemire*). Thus, "[a]bsent reasonably foreseeable economic harm, '[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the [employee] is insufficient to convict.'" *United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998) (quoting *Frost*, 125 F.3d at 368), *aff'd*, 526 U.S. 398 (1999); *see also United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996).[8] For the reasons set forth below, the majority view is correct and requires reversal of all counts of conviction.

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[8] The First Circuit has taken a similar position. *See United States v. Martin*, 228 F.3d 1, 17-18 & n.22 (1st Cir. 2000); *see also United States v. Serafino*, 281 F.3d 327, 332 (1st Cir. 2002) (government's proof "plainly sufficed to establish the requisite cognizable financial harm to MBC under section 1346") (citing *Jain*, 93 F.3d at 441-42). The Second Circuit applies a similar rule in "self-dealing" cases of the type that the prosecution charged here. *See United States v. Rybicki*, 354 F.3d 124, 141 (2d Cir. 2003) (en banc) ("In the self-dealing context, * * * the defendant's behavior must thus cause, or at least be capable of causing, some detriment – perhaps some economic or pecuniary detriment – to the employer.").

A. The Statutory Text And History Require The Government To Prove A Foreseeable Risk Of Economic Harm

1. It is common ground in the lower courts that the text of Section 1346 is not, by quite a distance, a model of legislative precision. As the en banc Second Circuit observed, one would have to "labor long and with difficulty in seeking a clear and properly limited meaning of 'scheme or artifice to deprive another of the intangible right of honest services' simply by consulting a dictionary for the literal, 'plain' meaning of the phrase." *Rybicki*, 354 F.3d at 135; *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) ("The central problem is that the concept of 'honest services' is vague and undefined by statute.").

Congress' use of the definite article ("the") and the phrase "right of" (rather than "right to") suggests that it *believed* it was invoking a term of art. *Rybicki*, 354 F.3d at 137-38.[9] Courts ordinarily will

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[9] When a phrase conferring or enumerating a right does so through a formulation using "right of," followed by the benefit to be received, as opposed to a right "to" that benefit, it almost invariably is a term of art with a meaning only as an entire phrase. *See, e.g., United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 113 (1957) (interpreting the phrase "right of way" as a whole). In contrast, phrases involving the formulation "right to," followed by a benefit to be conferred on the recipient, are more commonly separated into their component parts and defined by finding the meaning of each individual word. The right to counsel, for example, is the right to have representation by a lawyer; but a "right of way" cannot be defined through the same deconstruction of the phrase. Congress's use of the word "of," followed by a noun, therefore signals that the entire phrase—intangible right of honest services—was meant to have its own separate meaning as a term of art, unlike "intangible right *to*

[Footnote continued on next page]

infer that Congress intended "to incorporate the established meaning" of terms "that have accumulated settled meaning under the common law." *Neder*, 527 U.S. at 21 (internal quotation marks omitted); *see also Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911). This canon is of limited utility, however, in mapping the scope of Section 1346 because the phrase "the intangible right of honest services"—at least as applied to conduct in the private sector—had no settled or well-known meaning in law (common or otherwise) in 1988.

Not a single pre-*McNally* case used the phrase "the intangible right of honest services." Moreover, the phrase cannot be read simply as a broad restoration of all pre-*McNally* case law addressing intangible rights, since the text does refer to "honest services," not to all conceivable intangibles. As this Court explained in *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000), Section 1346 covers only "one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*." Yet even references to "honest services" in pre-*McNally* case law scarcely remit the Court to a settled body of doctrine, especially in the private sector. As the en banc Fifth Circuit has noted, "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion," because the doctrine never was a "unified set of rules" even in the public corruption area where the pre-1988 doctrine was more per-

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[Footnote continued from previous page]

honest services," a term whose meaning *might* be ascertainable by defining "honest services" alone and combining it with the meaning of a "right to" something.

vasive and developed. *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (en banc).

The imprecision of the statutory language, together with the indeterminacy of the pre-*McNally* private-sector case law, bodes poorly for the constitutionality of Section 1346 when the Court is forced to confront it. As Judge Jacobs of the Second Circuit wrote for himself and three colleagues, "surely no unambiguous meaning can be assigned to a phrase that has no meaning except what can be distilled from *some* pre-McNally cases provided that *other* pre-McNally cases are ignored. * * * Ordinary people cannot be expected to undertake such an analysis; rare is the lawyer who could do it; and no two lawyers could be expected to agree independently on the elements of an offense that must be defined by such a project." *Rybicki*, 354 F.3d at 158, 160 (Jacobs, J., dissenting).

In this case, however, the convictions must be reversed on a much narrower ground, because the prosecution disregarded the *one* restriction that is compelled by any fair reading of the language and history of Section 1346. Sections 1341 and 1343 outlaw three types of "scheme[s] or artifice[s]": schemes or artifices (1) "to defraud"; (2) "for obtaining money or property" by certain means; and (3) to supply or furnish "for unlawful use any counterfeit or spurious coin." Congress did *not* add to this list a fourth category. Instead, it chose to "include[]" schemes "to deprive another of the intangible right of honest services" within the meaning of a scheme *"to defraud."* In denoting this new category of schemes as a species of *fraud*, Congress surely "had in mind" a conventional concept of fraud as the evil it was targeting. *Cf. Solid Waste Agency Of Northern Cook Cty. v.*

Army Corps Of Engineers, 531 U.S. 159, 172 (2001) (rejecting government's argument that in defining "navigable waters" as "waters of the United States" Congress intended to read "navigable waters" out of the statute); *Boyle v. United States*, 129 S. Ct. 2237, 2243 (2009) (RICO statute provides that the term enterprise "includes" certain "specifically enumerated" items, and it may include "others that fall within the ordinary meaning of" enterprise).

The text of the statute therefore makes clear that it targets employee dishonesty—the "depriv[ation] * * * of honest services"—only insofar as such dishonesty may be understood as *"fraud."* The statutory formulation therefore cannot encompass mere breaches of workplace rules or employee disloyalty that pose no significant risk of tangible economic injury to the employer, because it has long been recognized that one essential element of "fraud" is "pecuniary loss" to another. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "defraud" as: "To cause injury or loss to (a person) by deceit."). The chapter of the Restatement of Torts addressing "Fraudulent Misrepresentation (Deceit)," for example, explained at the time of Section 1346's enactment that one who "fraudulently" makes misrepresentations to another "is subject to liability to the other in deceit *for pecuniary loss caused*" by "justifiable reliance upon the misrepresentation." Restatement (Second) of Torts § 525 (1977) (emphasis added); *see generally Neder*, 527 U.S. at 22 (looking to the Restatement to determine an element of mail fraud).

To be sure, proof of *actual* economic injury is not required in federal fraud prosecutions, for Congress chose to criminalize "the '*scheme* to defraud,' rather than the completed fraud." *Neder*, 527 U.S. at 25

(emphasis added). But by the same token it has always been understood that one who neither "intends nor has reason to expect" that his conduct will cause others a "pecuniary loss" does not "bring him[self] within the rule" that proscribes "fraud." Restatement, § 531 & cmt. b. As Judge Friendly said in a leading pre-*McNally* case, "[w]hile the statute must reach some schemes or artifices to defraud that do not in themselves involve 'obtaining money or property by means of false or fraudulent pretenses,'" and the "scheme" language relieves the government of the burden of proving "that the [victims] were in fact defrauded * * * 'this does not mean that the government can escape the burden of showing that some actual harm or injury was *contemplated*.'" *United States v. Dixon*, 536 F.2d 1388, 1398-1400 & n.11 (2d Cir. 1976) (quoting *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 (2d Cir. 1970) (emphasis in original)); *see also United States v. von Barta*, 635 F.2d 999, 1006 & n.14 (2d Cir. 1980) ("breach of an employee's fiduciary duty, without more, does not violate the mail fraud statute"; the government must prove materiality *and* "that some actual harm or injury was at least contemplated").

In *United States v. Lemire*, 720 F.2d 1327, 1335-37 (D.C. Cir. 1983), the District of Columbia Circuit provided perhaps the most thorough and careful pre-*McNally* analysis of contemplated economic harm as an essential element of honest-services "fraud" in the private sector. Like this case, *Lemire* involved a fiduciary's alleged violation of his duty of loyalty. Showing that the only timeless constant in criminal law across the decades is the government's penchant for pushing the mail fraud statute to the point of absurdity, *see, e.g. Dixon*, 536 F.2d at 1398 (expressing "some wonder why the prosecutor thought it neces-

sary or desirable to include the mail fraud counts"), the government apparently argued in *Lemire* that "any intentional undisclosed breach of duty to an employer" was mail "fraud." 720 F.2d at 1336. The D.C. Circuit roundly rejected this submission, noting that "[o]nce * * * disloyalty alone becomes the crime, little remains before every civil wrong is potentially indictable." *Id.* at 1336-37 & n.11 (citation and internal quotation marks omitted).

The court explained that in the private sector "[e]mployee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the employer." *Id.* at 1336. Thus, because "[a]n employee's undisclosed conflict of interest does not by itself pose the threat of economic harm to the employer," the court held "that an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute." *Id.* at 1337. Agreeing with the Second Circuit in *Dixon* and *von Barta*, *supra*, the court emphasized that the government must prove, and the jury must find, "a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.*; *see also id.* at 1338 (defendants must scheme to deprive the victim of "a business opportunity or economic benefit"); *id.* at 1341 (noting the "need to find that the defendants contemplated some kind of pecuniary harm to the employer").

In warning of the need to rein in prosecutors with a contemplated pecuniary harm requirement, *Lemire* also cited *United States v. Feldman*, 711 F.2d 758 (7th Cir. 1983), where the government prosecuted an employee who had hid his interest in an ac-

count collateralized by phony bank guarantees. In affirming the conviction, the Seventh Circuit made clear that a conviction could not be based solely on the employee's mere violation of a policy against a secret financial interest in customer accounts. *Id.* at 763. As the court explained, "breach of duty" and "receipt of secret profits" "must be accompanied by a scheme formed with the intent *to defraud*." *Id.* (emphasis in original). Thus, a "breach of duty can support conviction * * * only if the nondisclosed information * * * could or does result in harm to the employer." *Id.*

The Fifth Circuit took a similar approach that likewise focused on the foreseeability of economic harm to the employer. In *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), the court affirmed the conviction of a power company employee who secretly received kickbacks from employees of companies that the defendant installed as intermediaries in his employer's purchases of oil. The court ruled that violation of a duty to disclose "material" information is a "detriment" to one's employer when the employee "has reason to believe the information would lead a reasonable employer to change its business conduct"—a fact established by proof that the undisclosed information would have allowed the employer "to purchase the oil at a significantly lower price." 663 F.2d at 541-542. On the other hand, the court *reversed* the convictions of the intermediary companies' employees who secretly profited, finding it legally insufficient that their employers may have wanted to transact directly with the power company so as "to gain favor with" it as a "customer for the future." *Id.* *Lemire* explained that "[b]y rejecting that argument," the *Ballard* court "effectively asserted that general threats to business interests posed by

employee conflicts of interest are too speculative to support a mail fraud conviction." 720 F.2d at 1338 n.15.

Lemire used the *Ballard* decision to demonstrate that although materiality is *part of* the fraud analysis, it does not *replace* the need to prove intent to defraud as a separate element of honest-services fraud. "Since an employer presumably would 'change its business conduct' only if, upon disclosure of the conflict and any other relevant information, it saw new opportunities for profit or savings, or dangers of economic harm, the notion of materiality of nondisclosure or misrepresentation in the wire fraud context must logically focus on the reasonable foreseeability by the employee of potential economic harm to his employer stemming from the employer's ignorance of information relevant to the conflict." 720 F.2d at 1338.

Thus, it was well understood when Congress enacted Section 1346—just as it is today—that a private actor's conduct can be "fraud" *only if* he intended some identifiable economic injury to the victim. Indeed, just one month before this Court decided *McNally*, the government agreed that, in the "uniformly held" view of the lower courts, the mail fraud statute reaches "a scheme to use a private fiduciary position to obtain direct pecuniary gain" where "that scheme contemplates some sort of harm to the principal." Brief for the United States at 32, *Carpenter v. United States*, No. 86-422 (May 1, 1987). The government's brief elaborated on the *type* of contemplated harm that must be established, citing the "thoughtful opinion" of the D.C. Circuit in *Lemire* as authority for the requirement that such harm be "identifiable" and "apart from the breach itself." *Id.*

at 33 (footnotes omitted; alterations in original). Of course, there can be no doubt that the contemplated harm requirement in *Lemire's* "thoughtful opinion" was "an economic harm." 720 F.2d at 1338.

In sum, in enacting Section 1346, Congress did not make a federal crime out of any arguable failure to render "honest services," but sought to target such conduct only as part of a broadened understanding of "scheme *to defraud*." It did not remotely license federal prosecutors, as here, to pursue their own untethered understanding of "honesty" apart from any conventional understanding of "fraud." Because the latter has always required, at a minimum, that the defendant be shown to have intended some sort of economic injury to the victim, petitioners were deprived of the one protection that the language of the statute clearly affords them.

2. The legislative history of Section 1346 supports the conclusion that the government cannot prevail without a jury finding that the defendants contemplated economic harm to the victim.

A month after this Court decided *McNally*, Representatives Mfume and Synar introduced The Mail Fraud Amendment Act of 1987, H.R. 3050, 100th Cong. (1987), with the intent "simply to correct a judicial interpretation which has severely restricted the Federal Government's power to attack public corruption under the mail fraud statute." 133 Cong. Rec. H6798-02 (July 29, 1987) (Rep. Mfume). Like other bills that were introduced to "overrule" *McNally*, this bill principally targeted the effect of *McNally* on conduct by government officials and employees.

Other proposals were broader, including a bill introduced a week later—The Fraud Amendments Act

of 1987, H.R. 3089, 100th Cong. (1987). It would have expansively defined "defraud" throughout the United States Code to "include[] defrauding another (1) of intangible rights of any kind whatsoever in any manner or for any purpose whatsoever; or (2) by using material private information wrongfully stolen, converted, or misappropriated in breach of any statutory, common law, contractual, employment, personal, or other fiduciary relationship." An identical bill (S. 1898) was introduced in the Senate on November 30, 1987. Although these proposals, ultimately abandoned, would have expanded fraud prosecutions in the direction now advocated by the government, even their sponsors' attention was focused "particularly" on "political corruption." 133 Cong. Rec. E3240-02 (Aug. 4, 2007) (Rep. Conyers) (adding only one other specific objective of the bill: prosecution of insider trading on confidential information).[10]

Two other bills were introduced in the Senate the following year—The Anti-Public Corruption Act of 1988, S. 2531, 100th Cong. (1988), and The Anti-Corruption Act of 1988, S. 2793, 100th Cong. (1988)—but they too were not enacted. The first dealt solely with public corruption. It was proposed by the Department of Justice at the only hearing Congress held to consider any of these bills—before the House Judiciary Committee on May 12, 1988.

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[10] Before Congress voted to enact Section 1346 this Court held that *McNally* did not prevent prosecution of cases involving misappropriations of confidential commercial information, because such information is property protected under the mail fraud statute. *See Carpenter v. United States*, 484 U.S. 19 (1987).

The overriding focus of that hearing was "how we can continue to use the intangible rights doctrine in the mail or wire fraud statutes to prosecute public officials who use their office in a corrupt fashion." *Hearing on H.R. 3089 and H.R. 3050 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 100th Cong. 1 (1988) (Opening Statement of Chairman Conyers).

"On its face," Section 2 of S. 2793 "would have been a fairly comprehensive, articulate and clear attempt to define criminal conduct" in the public sector. *Brumley*, 116 F.3d at 744 (Jolly, J., dissenting). In separate subsections it targeted those who defraud state and local inhabitants of "the honest services" of state local officials, the same inhabitants of "a fairly and impartially conducted election process," and United States inhabitants of "the honest services of" federal public officials. Section 3 of the bill would have created Section 1346, defining the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive an organization of the intangible right of honest services *in which the defendant received or attempted to receive, for the defendant or another person, anything of value or in which the defendant intended or contemplated loss or harm to the organization.*" S. 2793, § 3 (italics added). Although the wording of this bill varied from others before it, the "purpose" asserted was the same: "to overturn" this Court's *McNally* decision. 134 Cong. Rec. S12581-04 (Sept. 15, 1988) (Sen. Biden).

Senator Biden, one of the sponsors of S. 2793, explained that his proposal responded to those courts and commentators that "had criticized the intangible rights doctrine as having the potential to include within the ambit of the criminal law, every breach of

duty owed by one person to another, whether or not any harm was contemplated or possibly could have resulted from the scheme." 134 Cong. Rec. S12581-04. "Indeed," Senator Biden continued, "before *McNally* a number of courts had begun to move toward an approach that required a showing of some foreseeable harm to the person to whom the duty was owed." *Id.* He specifically mentioned *Lemire* as one of those cases where the courts had begun to place such limits on a theory that otherwise could turn "every breach of fiduciary duty" into a crime. 134 Cong. Rec. S12581-04; *see also* 134 Cong. Rec. S15999-01 (Oct. 14, 1988) (Senator Biden) (bill's limitation on schemes where loss or harm is contemplated or intended is "in keeping with" what cases such as *Lemire* have "held").[11]

The bill that *did* pass—an amendment to The Anti-Drug Abuse Act of 1988, H.R. 5210, 100th Cong. (1988)—was a shorter version of Section 3 of S. 2793. Unlike S. 2793, it applied to schemes aimed at "another" (rather than "an organization"). It also deleted the language (italicized above) that expressly referred to the defendant's intent to inflict economic harm. No explanations were given for the changes. In fact, the enacted text was "never referred to any committee of either the House or the Senate, was

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[11] Senator Biden mentioned three other cases that supported a requirement of "contemplated" or "foreseen" harm—*Ballard*, *Feldman*, and *United States v. Siegel*, 717 F.2d 9, 14 (2d Cir. 1983). In *Siegel*, as in the other cases, the defendants not only could have foreseen economic harm, they knowingly inflicted it. As corporate officers, they concealed their "misappropriation of more than $100,000" in company merchandise which they then sold for, among other things, personal enrichment. *Id.* at 15.

never the subject of any committee report from either the House or the Senate, and was never the subject of any floor debate reported in the Congressional Record." *Brumley*, 116 F.3d at 742 (Jolly, J., dissenting). It passed as a last-minute amendment to the Anti-Drug Abuse Act of 1988—one of thirty unrelated criminal law provisions.

There is good reason to believe, however, that Congress chose the simpler phrasing as a preferred way to reinstate pre-McNally case law, which included the limitations set forth in *Lemire* and similar cases. That is because the amendment was cast in terms of what is "included" in a "scheme to defraud," a phrase that had widely been interpreted by the lower courts to encompass a contemplated harm requirement in any event. In fact, in introducing the language that was enacted, literally at the midnight hour (12:45 a.m. on the last day of that Congress), Representative Conyers simply stated that it "restor[ed] the mail fraud provision to where that provision was before the *McNally* decision," and that "[n]o other change in the law [was] intended." 134 Cong. Rec. H11108-01 (Oct. 21, 1988). Senator Biden, the sponsor of S. 2793, later described the bill in the same terms. *See* 134 Cong. Rec. S17360-02 (Nov. 10, 2008) (statement of Senator Biden) (noting that Congress intended to "reinstate" the pre-*McNally* case law "without change" when it enacted Section 1346).

Thus, whatever else might be said about the scope of the sponsors' intent to "restore" pre-*McNally* cases by enacting Section 1346, it seems reasonably certain that the requirement at issue here—*i.e.*, that the prosecution be required to prove that the defendants contemplated identifiable economic harm to the victim—was very much a focus of legislative con-

cern. It is the one requirement of pre-*McNally* law of which Congress undoubtedly was specifically aware and that it intended courts to enforce under Section 1346.

B. The Majority Rule Is Also Supported By The Need To Avoid The Difficult Constitutional Questions That Would Arise From Applying Section 1346 More Broadly In The Private Sector

The need to interpret Section 1346 in keeping with conventional notions of "fraud," and in particular the requirement that the defendant have intended to inflict economic injury on the victim, is confirmed by the serious constitutional questions that would arise from a broader construction of Section 1346 as targeting all manner of "dishonesty" in the private sector. *Cf. Northwest Austin Mun. Utility District No. 1 v. Holder*, 129 S. Ct. 2504, 2513 (2009). Were Section 1346 read as the government has urged in this case, it would essentially become an open-ended delegation of authority to the courts to develop common-law crimes, and, in particular, "a common-law crime of unethical conduct." *Sorich*, 129 S. Ct. at 1310. From the earliest days of the Republic, however, this Court has consistently refused to embark on such an exercise, which would cast the judiciary in the law-making role that the Constitution assigns to Congress and would likely violate "separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689 (1980).

1. By the time this Court decided *United States v. Hudson* in 1812, it was already "long since settled in public opinion" that federal courts lack authority to define and punish penal offenses in the common

law fashion. 11 U.S. at 32; *see also United States v. Worrall*, 2 U.S. (Dall.) 384 (Chase, Circuit Justice, C.C.D. Pa. 1798). *Hudson* stressed the limited powers that the states had ceded to the federal government, and it reasoned that any law-making power to define crimes that the Constitution bestowed on the national government was given to Congress, not to the courts. *Id.* at 33-34. Despite Justice Story's view to the contrary, this proposition was considered so unassailable that the Attorney General declined to challenge it a mere four years later. *See United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816), *rev'g*, 25 F. Cas. 619, 619-20 (Story, Circuit Justice, C.C.D. Mass. 1813).

A narrow reading of *Hudson* might limit its holding to the proposition that federal courts lack inherent authority to define crimes, though not necessarily that Congress lacks all power to delegate law-making authority to the judiciary. This Court, however, has for nearly two hundred years treated *Hudson* as standing for the broader proposition that federal crimes must be "explicitly prescribed by Congress." *Jerome v. United States*, 318 U.S. 101, 104-05 (1943); *see also Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Britton*, 108 U.S. 199, 206 (1883). Under this understanding, "[i]f Congress has not declared an act * * * to be a crime against the United States, the courts have no power to treat it as such." *United States v. Reese*, 92 U.S. 214, 216 (1875); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952) (the "doctrine which denies to the federal judiciary power to create crimes forthrightly" also precludes "constituting them from anything less than the incriminating components contemplated by the words used in the statute"). Indeed, as recently as last year, three Justices cited

Hudson to reject the suggestion that broad, ambiguous language can "'effectively' license[] [the Court] to write a brand-new law," because "*we cannot accept that power in a criminal case*, where the law must be written by Congress." *United States v. Santos*, 128 S. Ct. 2020, 2030-31 (2008) (plurality opinion of Scalia, J., joined by Souter and Ginsburg, JJ.) (emphasis added).

The government's sweeping interpretation of Section 1346, bereft as it is of any significant legislative constraint on the conduct that might be deemed criminal under the statute, would require the Court to decide whether Congress may lawfully delegate to the courts so broad a power to make penal law. Yet nothing in the text or the history of Section 1346 remotely suggests that Congress intended to test that constitutional line. Under settled law, that is reason enough to reject the government's position. *See, e.g., Mesa v. California*, 489 U.S. 121, 136-37 (1989).

2. Apart from separation of powers, the government's expansive interpretation cannot surmount the settled constraints of federalism. This Court ordinarily requires that Congress, rather than the courts, unambiguously determine how deeply the federal government has ventured into traditional state concerns (*e.g., United States v. Bass*, 404 U.S. 336 (1971)), and this concern is especially acute where, as here, judicial law-making in specific cases may well exceed the constitutional authority that Congress itself has over the subject matter.

With respect to private conduct, Congress enacted Section 1346 pursuant to its constitutional

power over commerce.[12] The mail and wire fraud statutes are, respectively, also partly and wholly based on Congress' commerce powers. Yet the government's interpretation of Section 1346 would reach purely intrastate private conduct that is in some sense "dishonest," even if the defendant did not so much as contemplate a *risk* of economic injury to the victim. Indeed, one of the three "fraud" convictions in this case (count 7) relied for federal jurisdiction on a delivery by private carrier from Marion, Illinois to Chicago, Illinois.

This Court has previously refused to impute to Congress the intent to federalize vast areas of the law of fiduciary obligations even under a civil statute clearly directed at commerce. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-80 (1977). Here, the government interpretation creates federal *criminal* liability for *all* types of dishonest conduct *in addition* to fiduciary self-dealing, even purely local conduct (like the employee who phones in sick so he can go to a ball game, *see Sorich*, 129 S. Ct. at 1309), where any substantial connection to interstate commerce is at best tenuous. *Compare United States v. Morrison*, 529 U.S. 598 (2000). Broadly interpreting this statute in this fashion would raise serious questions as to its constitutionality. *E.g.*, *Jones v. United States*, 529 U.S. 848, 857-58 (2000). "[I]n the absence of a clear statement by Congress," therefore, this Court should decline the government's invitation "to approve [this] sweeping expansion of federal criminal

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[12] With respect to public corruption, Congress also relied on the Constitution's guarantee, in Article IV, Section 4, of a republican form of government. 133 Cong. Rec. H10656-01 (Nov. 19, 1987).

jurisdiction." *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *see also id.* at 26 ("we decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear"); *Rewis v. United States*, 401 U.S. 808, 812 (1971). *Williams v. United States*, 458 U.S. 279, 290 (1982).

3. Finally, the government's all-encompassing interpretation would also raise serious questions of constitutionality under the Fifth Amendment. A statute that reaches any "dishonest" conduct in the private sector, where one does not even *contemplate* exposing another to economic harm, deprives the citizenry of the fair notice required by due process.

It has long been a cornerstone of the rule of law in this country that "[i]f the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime." *United States v. Reese*, 92 U.S. 214, 220 (1875); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). For that reason, the Due Process Clause forbids laws that criminalize conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

As many courts have warned, without a contemplated or foreseeable economic harm requirement the statute "would potentially criminalize *any* breach of a duty of loyalty in the private employment context." *Vinyard*, 266 F.3d at 328. Without even that minimal "substantive limit" on how the doctrine applies to those in the private sector, *see Frost*, 125 F.3d at

369, Section 1346 would create the type of forbidden "standardless sweep" that "allows police, prosecutors and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).[13] Indeed, in *this* case the government convicted petitioners on the theory that they "deprived" Hollinger of "honest services" by engaging in transactions that, in violation of Delaware fiduciary rules, were less than "entirely fair" to Hollinger. J.A. 336a. If *that* is a correct interpretation of Section 1346, the law cannot possibly be constitutional. *See, e.g., United States v. Cohen Grocery*, 255 U.S. 81, 89 (1921).

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[13] The lack of fair warning, the risk that prosecutors will simply pursue personal predilections, and the intrusion into matters best left to the States (if anyone at all) are all evidenced by the types of cases federal prosecutors already have brought in the name of fighting fraud. Only where the courts have interposed common sense have these efforts occasionally failed. *See, e.g., United States v. McNeive*, 536 F.2d 1245, 1252 (8th Cir. 1976) (government "grossly exceeded" mail fraud statute's limitations by pursuing a plumbing inspector who accepted tips in the performance of non-discretionary duties); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) ("we find no evidence that Congress intended to create what amounts to a draconian personnel regulation"); *United States v. Handakas*, 286 F.3d 92, 107 (2d Cir. 2002) (rebuffing government's wire fraud prosecution of a breach of state law contractual rules) (overruled by *Rybicki*). As Cardinal Roger M. Mahony of the Los Angeles Archdiocese has come to learn, Section 1346 also grants the U.S. Attorney license to use the grand jury's coercive powers to "determin[e] whether Mahony, and possibly other church leaders, committed 'honest services fraud' by failing to adequately deal with priests accused of sexually abusing children." Scott Glover & Jack Leonard, *Cardinal Mahony Under Federal Fraud Probe Over Abusive Priests, Sources Say*, LOS ANGELES TIMES, Jan. 29, 2009.

The statute at issue in *Cohen* made it unlawful, during wartime, willfully "to make any unjust or unreasonable rate or charge in the handling or dealing in or with any necessaries." The statute could not be enforced against a dealer in sugar, this Court concluded, because by "forbid[ding] no specific or definite act," the law left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.* at 89. This Court agreed with the lower court that "attempt[ing] to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Id.*

The statute that this Court invalidated in *Cohen* was, if anything, more definitive than the government's conception of Section 1346 as a general regulation of "honesty" in the marketplace. Because the government's interpretation would be "in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction," *Reese*, 92 U.S. at 221, it fails the basic rule that Congress may not "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Id.*

* * *

The rule of lenity cautions that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Jones*, 529 U.S. at 858 (citation omitted). Under this rule, the Court "interprets ambiguous criminal statutes in favor of defendants, not prosecutors." *Santos*, 128 S. Ct. at 2028

(plurality opinion). Lenity is "especially appropriate" in mail fraud prosecutions, "because, as this case demonstrates, mail fraud is a predicate offense under RICO * * * and the money laundering statute." *Cleveland*, 531 U.S. at 25.

Here, although every conventional tool of statutory analysis actually forecloses the government's position, any ambiguity must be resolved in petitioners' favor. Indeed, petitioners could have studied the statute, its legislative history, and even the pre-*McNally* case law at length, and still have come away without fair warning that it would be "mail fraud" to call management fees non-compete payments where the payees had earned the fees, the Hollinger board had already approved their payment, and the recharacterization was accomplished without posing a foreseeable risk of economic harm to Hollinger.

C. The Failure To Instruct On The Essential Finding Of Contemplated Economic Harm Deeply Prejudiced Petitioners

The instructional error requires reversal on the only four counts that survived the jury's skepticism of the government's spectacularly overcharged case. The Seventh Circuit affirmed the mail fraud convictions by misapplying this Court's harmless error precedents. The instructional error also prejudiced the jury's consideration of the obstruction count filed against Black, allowing it to convict on a mistaken belief—fueled by prejudicial evidence and flawed instructions—that Black had something to hide.

1. The Seventh Circuit held that "even if [its] analysis of honest services fraud is wrong, the defendants cannot prevail," because any instructional error was "harmless." Pet. App. 9a-10a. It reached

that conclusion only by misapplying this Court's harmless error test—a test reaffirmed last Term in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008). The Seventh Circuit misconstrued the inquiry as whether the jury *could* have found petitioners guilty had it been *properly* instructed. The correct analysis reveals at least a reasonable doubt whether the *improper* instructions that *were* used tainted the verdict the jury *did* return. Prejudice, evaluated under the correct test, is plain.

In *Pulido*, this Court reiterated that "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Id.* at 530. *Pulido* made clear that this type of "*Yates* error" in jury instructions (*see Yates v. United States*, 354 U.S. 298 (1957)) is "harmless" only if a court can declare confidently that the legal error had no effect on the verdict. Where, as here, the jury was improperly instructed on an element of the offense, the government must negate the possibility of prejudice beyond a reasonable doubt. *Neder*, 527 U.S. at 15; *Chapman v. California*, 386 U.S. 18, 24 (1967).

The Seventh Circuit misapplied *Yates*. It noted the government's theory that petitioners "abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete." Pet. App. 10a. To be sure, that *was* the government's *primary* conjecture. But the government insisted on instructing the jury it also should convict if it found something quite different: that petitioners committed mail fraud by breaching their "fiduciary duty of loyalty" to Hollinger. J.A. 228a. With full support from the jury charge, the government argued that the two

theories should be considered in the disjunctive: "it's that theft of money and property causing" either gain to defendants "or the potential loss of money or property to another," on the one hand, "or depriving the corporation" of the "right of honest services of the corporate officers," on the other hand. J.A. 239a-240a (government's summation).

That is exactly the way the government defended the convictions in the district court when the issue was sufficiency of the evidence. "[A] reasonable jury could conclude that corporate officers and directors abused their positions of trust within the corporation to gain a favorable tax benefit—even if there were no 'monetary loss or financial damage' to [Hollinger]" and "even if defendants honestly believed that the APC money was nothing more than unpaid management fees." J.A. 440a.

On appeal, the government backtracked, arguing instead that the jury would have convicted only if it found a theft of Hollinger's money. *E.g.*, Opp. 15. The court of appeals, in turn, noted findings the jury "could" have made if it credited *some* of the government's evidence: "It is true that Radler, who pleaded guilty and testified for the government, said he thought the audit committee had approved the so-called management fees. But the members of the committee testified otherwise and the jury was entitled to believe them." Pet. App. 3a-4a. In the court's view, error under such circumstances may safely be deemed harmless. Pet. App. 10a.

Of course jurors are entitled to believe one government witness over another where, as here, "the evidence was conflicting." Pet. App. 3a. And each juror would have been well within his or her rights to reject the testimony of Radler—the government's *key*

witness whom it deemed fully truthful (*supra*, n. 5)—even after that witness consistently swore that the non-compete money petitioners received *was* management fees owed, and *approved*, by Hollinger. "Had the jury convicted on proper instructions it would be the end of the matter." *Morissette*, 342 U.S. at 276.

But as this Court emphasized in *Morissette*, juries are not bound to accept the government's theory. *Id.* Properly instructed jurors might instead have concluded that if Radler believed Black and the other officers were collecting money that rightfully was theirs, then petitioners—who relied on Radler for their information about these payments, and who, as the government characterizes what a reasonable jury could have found, "honestly believed that the APC money was nothing more than unpaid management fees," J.A. 440a—simply had no fraudulent intent. In short, the jurors, consistent with their verdicts on every other fraud count, "might have refused to brand" each petitioner "as a thief." *Id.* "Had they done so, that too would have been the end of the matter." *Id.*

2. The instructional error—an error allowing conviction for innocent conduct—also requires reversal of Black's conviction for corruptly impeding the investigation and prosecution of the same innocent conduct. Petitioners explained in seeking certiorari that the key element was whether Black had a "corrupt[]" intent when he assisted in moving his belongings shortly before being evicted from his office. The evidence supporting a bad intent was ambiguous at best; "there was a serious risk of prejudicial spillover from the mountains of highly inflammatory evidence introduced on the fraud counts"; and "[a] jury know-

ing that Black had not committed mail fraud would have been much more likely to conclude that he acted with a clean conscience rather than a corrupt intent." Pet. 11-12 n.7. The government, in opposing review, made no effort to deny that if the mail fraud counts are reversed, then the only other conviction must fall too.

The conviction stemmed from a decision by Black's assistant to move some of Black's belongings from their Toronto office to the assistant's Toronto home, where she was setting up a new office as a result of eviction by Hollinger's new management. The government made much of the date—May 20, 2005—one day after SEC counsel told Black's lawyers that a new document request was forthcoming. Apart from the undisputed fact that Black needed to completely clear out of the office within days (J.A. 198a-199a, 376a-377a), his lawyers testified unequivocally that they did *not* tell him about the SEC call until the following week. C.A. Sep. App. 424-428. And this was going to be the agency's *sixth* request for documents—Black had always fully complied with the previous requests by giving lawyers free rein to search his office *and* home. *Id.* at 485-96; J.A. 423a-424a. The record on this count, such as it was—*e.g.*, a *Canadian* document preservation order of uncertain applicability, Black's awareness of video cameras in the building, a "scheme" hatched and carried out in broad daylight with the knowledge of several witnesses, and the prompt return of the boxes in compliance with Canadian civil process—sufficed, in the estimation of the court of appeals, to get the case to the jury, but it hardly could have overwhelmed anyone on the issue of intent.

The government, in opposing certiorari, disputed that ruling for petitioners on the validity of the mail fraud instructions would require reversal of the mail fraud counts. Opp. 15-16. But it did not dispute that if *any* counts are reversed, *all* must be reversed. For one thing, a juror believing Black truly had something to hide (because he was guilty of fraud) would be much more likely to infer a corrupt intent from the circumstantial evidence than would a juror who realizes Black had *nothing* to hide. For another, the government introduced substantial evidence that put Black in a bad light on the fraud counts, and the prejudicial spillover was undeniable. *See, e.g., United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994) (reversing false statements convictions due to risk of prejudicial spillover from evidence that the government introduced on another count for which its theory of guilt was legally flawed); *United States v. Murphy*, 323 F.3d 102, 118-22 (3d Cir. 2003).

The government has waived the issue by choosing to refute none of it in opposing certiorari. *See* Sup. Ct. R. 15.2; *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009); *see also Aetna Health, Inc. v. Davila*, 542 U.S. 200, 212 n. 2 (2004). But even apart from waiver, the error here was not remotely harmless. Any juror would have had abundant reason to doubt that Black corruptly intended to undermine the fact-finding of an official proceeding if he concluded that Black had no reason to fear an investigation of his conduct. That doubt would only have heightened without the influence of considerable prejudicial evidence. Having acquitted on every other count, the jury had only its incorrect understanding of the law applicable to counts 1, 6 and 7 as reason to believe Black would try to impede a search for the truth. All counts of conviction must therefore be reversed.

II. THE SEVENTH CIRCUIT ERRED IN MANUFACTURING AN AD HOC AMENDMENT TO THE FEDERAL RULES THAT RETROACTIVELY IMPOSED AN ONEROUS REQUIREMENT FOR PRESERVING INSTRUCTIONAL ERROR

Petitioners fully complied with each requirement found in Rule 30(d), Fed. R. Crim. P., for preserving objections to the jury instructions. Pet. App. 193a-194a; 207a-208a; 248a. Undeterred, the government convinced the Seventh Circuit to adopt a new rule: a defendant forfeits his challenge to the legality of his conviction if he declines the government's *suggestion*, even one the prosecution later withdraws, that the jury deliver special verdicts on every affected count.

The Seventh Circuit had no authority to create novel procedural requirements, much less to *impose penalties* for violating them. It is particularly appropriate to apply the prohibition on ad hoc rule amendments here, because the new rule would require criminal defendants to accept a verdict form that is widely disfavored for intruding on the fundamental right to a fair trial, if they seek to establish that they were convicted based on innocent conduct.

1. Federal Rule of Criminal Procedure 30(d) "clarifies what, *if anything*, counsel must do to preserve a claim of error regarding an instruction or failure to instruct." *Id.* (advisory committee notes) (emphasis added). A defendant need only "inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." *Id.* Petitioners unquestionably complied with these requirements, fully satisfying Rule 30(d)'s purpose of "enabl[ing] a trial court to correct any instructional mistakes before the jury retires." *Jones v. United*

States, 527 U.S. 373, 387-88 (1999). That should have been the end of the issue.

Instead, the Seventh Circuit improperly grafted an extra preservation requirement and sanction onto Rule 30(d)'s specific and exclusive list: Petitioners "forfeited their objection" to the jury instructions because they did not acquiesce in the government's "request[]" for a special verdict form. Pet. App. 11a. The court cited no authority—because none exists—for its novel rule. Rule 30(d) clearly states the one circumstance when such a sanction may be imposed: "Failure to object in accordance with this rule."

Special verdicts would be a particularly odd candidate for allowing ad hoc rule amendments. Over half a century ago, this Court noted that federal rules provide for special verdicts in *civil* cases, but "no general practice of these techniques has developed in American criminal procedure." *Stein v. New York*, 346 U.S. 156, 178 (1953), *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964). Indeed, this Court explained, "[o]ur own Rules of Criminal Procedure make no provision for *anything but* a general verdict." *Id.* (emphasis added). Since the 1930s, these rules have established calibrated procedures for special verdicts in *civil* trials, including a separate sanction for non-compliance. Fed. R. Civ. P. 49. In criminal *bench* trials, conducted only with a defendant's consent, the rules allow for "specific findings of fact" upon "timely request" of one of the parties. Fed. R. Crim. P. 23(a) & (c). But the rules contain nothing of the sort in federal criminal *jury* trials.

And for good reason. The right to a general verdict in a criminal case is "one of the most essential features of the right of trial by jury * * * and the re-

moval of this safeguard would violate its design and destroy its spirit." *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969) (internal quotation marks omitted). After all, the Sixth Amendment "right to trial by jury" "usually implies one simple general verdict that convicts or frees the accused." *Stein*, 346 U.S. at 178.

Special verdicts can impair a defendant's constitutional rights in several ways. First, they "infringe on [the jury's] * * * power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations." *United States v. McCracken*, 488 F.2d 406, 418 (5th Cir. 1974). Second, they run a serious risk of confusing juries. *E.g.*, *United States v. Blackwell*, 459 F.3d 739, 766 (6th Cir. 2006); *see* Statement of Justice Black and Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments, 31 F.R.D. 587, 619 (1963). Third, by leading jurors through a "step by step * * * progression of questions[,] each of which seems to require an answer unfavorable to the defendant," special verdicts can coerce "a reluctant juror" to convict. *Spock*, 416 F.2d at 182; *United States v. James*, 432 F.2d 303, 307 (5th Cir. 1970). Fourth, special verdicts "partly restrict [the jury's] historic function * * * of tempering rules of law by common sense brought to bear upon the facts of a specific case." *McCracken*, 488 F.2d at 418; *Spock*, 416 F.2d at 181.

Although many lower courts no longer consider special verdicts *invariably* "improper and in and of themselves erroneous," *United States v. Adcock*, 447 F.2d 1337, 1339 (2d Cir. 1971), they remain "generally disfavored," *United States v. Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987), *United States v. Ellis*, 168 F.3d 558, 562 (1st Cir. 1999) (same), unless *the*

defendant consents.[14] This case, of course, is well outside that narrow exception. A special verdict would have unconstitutionally "infringe[d] on [the jury's] * * * power to arrive at a general verdict without having to support it by reasons." *McCracken*, 488 F.2d at 418; *Spock*, 416 F.2d at 181. Indeed, obtaining a report of the jurors' thought processes—nothing short of an invasion of "the jury's sovereign space," *Yeager v. United States*, 129 S. Ct. 2360, 2368 (2009)—was *the entire point* of the government's suggestion.

2. Even if special verdicts did not pose such a serious risk of prejudice to a criminal defendant's rights, reversal still would be required. This Court's well-established precedents bar a court from changing the criminal rules through an end-run around the rulemaking process. No federal court has "the power to develop rules that circumvent or conflict with the Federal Rules." *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *see also Bank of Nova Scotia v. Kilpatrick*, 487 U.S. 250, 255 (1988). Adding a new requirement to the rules violates that prohibition. *See United States v. Hyde*, 520 U.S. 670, 674 (1997). In *Hyde*, this Court held that Rule 11's "list" of "prerequisites to accepting a guilty plea" is exclusive, explaining that the Court's "task * * * is not to act as policymaker, * * * but rather to determine what the Rules actually provide." *Id.* at 678 n.3. It rejected the lower court's approach, which would

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[14] *E.g.*, Wayne R. LaFave et al., 6 *Criminal Procedure* § 24.10(a) (3d ed.) (adding that special verdicts are "at least 'suspect' as a matter of due process"); *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) (the "prohibition is for the benefit of the defendant").

have "read an additional prerequisite into this list." *Id. at* 674; *see also Carlisle*, 517 U.S. at 420-21 (a rule stating when a motion "may be made" leaves "no room" for a judge to accept a motion outside that timeframe); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the maxim *expressio unius est exclusio alterius* to reject additions to the particularity requirements in Federal Rule of Civil Procedure 9(b)).

The rule for preserving a claim of instructional error can only be changed "by the process of amending the Federal Rules," "not by judicial interpretation." *Id.*; *see also Libretti v. United States*, 516 U.S. 29, 50 (1995) (declining to read a fair notice provision into former Rule 31(e)—which, until rescinded, was the *only* federal rule authorizing special verdicts in criminal cases—because, *inter alia*, it "is not among the * * * safeguards" specifically listed in the Rule). The need for adherence to established rulemaking procedures is at its height where, as here, the new rule imposes harsh sanctions without proper notice. Fed. R. App. P. 47(a)(1) & (b) (even local written rules may not be created or enforced without "notice and opportunity for comment"); *see also* Fed. R. Crim. P. 57(a)(1) & (b) (same).

It is little surprise therefore that the courts, until now, have expressly "reject[ed] the prosecution's effort to salvage an invalid conviction by faulting the defendant for failing to request interrogatories." *United States v. Ruggiero*, 726 F.2d 913, 926 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part) (discussing *Adcock*, *supra*). The Second Circuit rejected the government's forfeiture rule in *Adcock*, *supra*, and has reaffirmed that aspect of *Adcock*. *See, e.g., Pforzheimer*, 826 F.2d at 206

(same). The Third Circuit likewise held that it would "not impose upon the defendants the harsh penalty of waiver merely for requesting that the district court exercise its discretion in a manner contrary to the government's preferences" for special interrogatories *United States v. Riccobene*, 709 F.2d 214, 228 (3d Cir. 1983).

3. Finally, the circumstances of this case amply demonstrate why rules should be put out for notice, comment and deliberation, rather than invented on the fly. For one thing, the Seventh Circuit imposed its penalty on petitioners for rejecting a *suggestion* by *the government*, made in "an abundance of caution," and then *withdrawn*. Pet. App. 228a; *see supra* at 13. The government therefore removed the special verdict issue from the trial judge's consideration before jury deliberations—only to trot it out again as an appellate issue.[15]

Moreover, the instruction had no possible consequence but to confuse the jury, because the judge had already ruled that, to convict, the jurors need not be unanimous on which theory of fraud they found. *See* Pet. App. 217a. Because the jury could convict with *some* jurors finding a scheme to obtain money, *other* jurors finding a scheme to deprive of honest services,

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[15] In fact, when the government withdrew its request, the judge had *already* ruled that *post*-verdict interrogatories were inappropriate due to "potential problems with inconsistencies with the verdict" and their novelty (Pet. App. 225a)—concerns that also apply to the government's suggested approach. In any event, petitioners' suggestion should have insulated them from a waiver sanction. After all, they did exactly what *the government* previously argued defendants should do if they want to *avoid* a waiver problem. *Riccobene*, 709 F.2d at 228.

and the *remainder* finding *both*, a special verdict consistent with the judge's determination of the law of mail fraud would have been unworkable, an invasion of the jurors' thought processes during their deliberations, and a source of significant confusion.

Finally, the government argued to the court of appeals, and still maintains before this Court, that "the jury would have acquitted" petitioners under the honest services theory had it believed the money was "legitimately owed to them," because this theory so "overlap[ped]" with the "money fraud" theory that both theories were one and the same. Opp. 4, 15. Yet now the government would penalize petitioners for not requiring the jury to state *separately* which of the two supposedly *identical* theories they believed. The government cannot fairly argue for a sanction—where that sanction is based on the assumption that two theories were analytically distinct—just so it can avoid defending on the merits the untenable position that the theories were identical all along.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the court of appeals with instructions to vacate petitioners' convictions on all counts.

Respectfully submitted.

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500

MICHAEL E. SWARTZ
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000
Counsel for Petitioner Kipnis

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100
Counsel for Petitioner Black

July 30, 2009

RESPONDENT'S BRIEF

SEP 30 2009

No. 08-876

In the Supreme Court of the United States

CONRAD M. BLACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in failing to instruct the jury that, to find petitioners guilty of mail fraud on the theory that they deprived their employer of their honest services, the jury had to find that their fraudulent scheme contemplated economic harm to the employer.

2. Whether, by opposing the government's request for special verdicts that would have required the jury to make separate findings on property-rights mail fraud and honest-services mail fraud, petitioners forfeited the claim that their mail fraud convictions must be reversed because of the impossibility of determining whether the jury's general verdicts rested on the honest-services theory.

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In the Supreme Court of the United States

No. 08-876

CONRAD M. BLACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2008. A petition for rehearing was denied on August 13, 2008 (Pet. App. 18a-19a). On October 29, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 10, 2009. The petition was filed on January 9, 2009, and was granted on May 18, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346, and petitioner Black was convicted of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). The court of appeals affirmed their convictions, and petitioners sought this Court's review of their mail fraud convictions to the extent they rested on Section 1346's prohibition of schemes to "deprive another of the intangible right of honest services." Pet. App. 1a-17a.

1. Petitioner Conrad M. Black was Chief Executive Officer and Chairman of the Board of Hollinger International, Inc. (Hollinger), a publicly held company that owns newspapers. Petitioners John A. Boultbee and Mark S. Kipnis were also senior executives of Hollinger. Pet. App. 2a; Gov't C.A. Separate App. 531-533 (Gov't C.A. App.).

Hollinger was controlled by a Canadian company called Ravelston in which Black held a majority stake. Boultbee, as well as Peter Y. Atkinson and F. David Radler, two other Hollinger executives, also owned stock in Ravelston. Black, Boultbee, Atkinson, and Radler were not paid directly by Hollinger but instead by Ravelston, which received management fees from Hollinger in exchange for their services. Pet. App. 2a; Gov't C.A. App. 53-56, 60-67, 212, 553, 557.

In 1998, Hollinger began selling many of its small community newspapers. In connection with those sales, Hollinger frequently executed non-competition agreements in which it promised the purchaser that it would not operate a newspaper near the newspapers it sold for a certain period of time after the sale. Petitioners used

purported non-competition agreements to pay themselves millions in fees that Hollinger did not authorize for that purpose, from funds that would otherwise have gone to Hollinger. Pet. App. 2a-4a, 32a; No. 05-CR-727, 2007 WL 3254452, at *4-*9 (N.D. Ill. Nov. 5, 2007); Gov't Exh.-Board-1B; 4/24/07 Tr. 5435-5439; 5/2/07 Tr. 7112.

The APC Scheme. One of petitioners' schemes involved a Hollinger subsidiary called APC, which was in the process of selling the newspapers it owned. When APC had only one newspaper left—a weekly community paper in Mammoth Lake, California—Kipnis prepared and signed on behalf of APC an agreement that paid $5.5 million to Black, Boultbee, Atkinson, and Radler, purportedly in exchange for their promises not to compete with APC or its affiliates for three years after they stopped working for Hollinger. Unlike the non-competition agreements executed by Hollinger, however, the APC agreement was not linked to the sale of any newspapers. Instead, it involved freestanding promises by Black and the others not to compete with a company that they themselves owned. Additionally, when the agreement was executed, no reasonable possibility existed that they would start a newspaper in Mammoth Lake (population approximately 7000). The checks for the $5.5 million were backdated to the year in which APC had sold most of its newspapers in order to make the purported non-competition payments seem more plausible. Petitioners did not disclose the transaction to either Hollinger's board of directors or its audit committee, which was required to approve transactions between Hollinger's executives and the company (or its subsidiaries) because of conflict-of-interest concerns. Pet. App. 2a-3a; J.A. 106a-107a, 123a-124a, 153a-158a; Gov't

C.A. App. 127-128, 182, 196-201, 205-206, 208-209, 214, 398, 403, 408, 413, 420, 539, 568, 599.[1]

At trial, some defendants at times suggested that the $5.5 million represented management fees owed to Ravelston and that they had characterized the fees as compensation for non-competition agreements to gain a tax benefit in Canada. But the evidence showed that (1) Hollinger's board of directors never approved the payments; (2) the payments were not made to Ravelston but to Black, Boultbee, Atkinson, and Radler personally (even though they never received management fees directly from Hollinger or its subsidiaries); and (3) the payments came from the proceeds of a newspaper sale rather than from a management-fee account. Although Radler, who pleaded guilty and testified for the government, stated that, when the payments were made, he mistakenly believed that Hollinger's audit committee had approved them as management fees, other Hollinger employees and officers, including members of the audit committee, testified that the payments had not been approved. Pet. App. 3a-4a; J.A. 52a-55a, 106a-107a, 116a-117a, 123a-129a, 159a-160a, 353a-356a; Gov't C.A. App. 113, 182, 196-201, 445-451; 5/2/07 Tr. 7112.[2]

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[1] Although petitioners argue (Br. 9 & n.4) that the non-competition agreement also barred them from competing with Hollinger and its other subsidiaries, no evidence suggests that petitioners had construed the agreement that way before trial. Radler testified that he understood the agreement to bar competition only with the Mammoth paper. J.A. 153a-154a. And board members testified that they had no concerns about competition from petitioners and had not, as they would have done in standard business practice, discussed negotiating non-competes with them. J.A. 106a-107a, 123a-124a; Gov't C.A. App. 182, 199-201.

[2] Petitioners repeatedly mischaracterize (Br. 3, 9, 47) Radler's testimony, asserting that he stated that the $5.5 million was in fact pre-approved management fees. In fact, Radler testified that, when the

Petitioners did not disclose the APC payments until Hollinger filed its 10-K statement with the Securities and Exchange Commission (SEC) in April 2002. That filing described them as "non-competition" payments, made "[i]n connection with the sales of * * * newspaper properties," "to satisfy a closing condition," with the "approv[al]" of Hollinger's "independent directors." J.A. 396a. Every part of that description was false. Pet. App. 4a; J.A. 56a-60a, 116a-117a, 123a-125a, 128a-129a.

The Forum/Paxton Scheme. Another scheme involved the payment of $600,000 in proceeds from the sale of newspapers to Forum Communications Co. and Paxton. Neither Forum nor Paxton requested non-competition agreements with individual executives in connection with those sales, and none was executed.[3] Instead, after a phone conversation with Black, Radler inquired whether any funds from the sales had been set aside for individual non-competition agreements. Rad-

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payments were made, he *believed* they were approved management fees and "was not aware that [he] was *actually issuing money that belonged to Hollinger*." J.A. 159a (emphasis added). Petitioners also incorrectly assert (Br. 10 n.5) that the government argued on appeal that Radler committed perjury. The government argued that Radler was incorrect, not that he committed perjury. As the government's sentencing filings state, "[w]hile there are instances—such as the APC payments—where other evidence proved Radler's initial understanding of events to have been mistaken, the government does not believe that this undermines Radler's overall credibility or the truthfulness of his testimony." Gov't Sentencing Position Concerning David Radler 17 (Nov. 9, 2007) (unsealed Sept. 24, 2009).

[3] Based on a memorandum Radler sent petitioners as a joke, J.A. 374a-375a; 5/8/07 Tr. 7799-7800; 5/14/07 Tr. 8566-8567, petitioners assert (Br. 10) that Forum and Paxton demanded individual non-competition agreements. But the officers of the companies testified precisely the opposite. J.A. 35a-39a, 42-47a.

ler learned that no money had been set aside for that purpose, because no non-competition agreements had been executed, but that $600,000 remained from the sale.[4] Black and Radler then agreed that Radler would divide the money among Black, Radler, Atkinson, and Boultbee, according to the same formula used to divide past non-competition payments. Even though these payments were related-party transactions, petitioners did not seek approval from the audit committee. J.A. 35a-39a, 42a-47a, 104a-107a, 111a-115a, 123a-125a,140a-153a; Gov't C.A. App. 604, 609; 4/25/07 Tr. 5510, 5531-5532, 5541-5542; 4/27/07 Tr. 6059; 5/1/07 Tr. 6624.[5]

The payments were not disclosed in SEC filings until the April 2002 10-K. That filing stated that the payments were made pursuant to non-competition agreements, to satisfy a closing condition in connection with the sale of newspapers, and with the approval of Hollinger's independent directors. J.A. 396a. Again, each aspect of that statement was false.

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[4] Petitioners inaccurately contend that Radler testified that, when he made the payments, he "thought the money had been set aside" for non-competes. Br. 11 (quoting J.A. 142a). Radler testified that, although he initially believed money had been set aside for that purpose, he and Black ordered the payments only *after* he learned that no money had actually been set aside. J.A. 146a-149a, 152a.

[5] Petitioners incorrectly assert (Br. 10) that Hollinger's board approved the supplemental payments using executive committee consents. Only the audit committee could have approved the payments, because the executive committee was not composed of independent directors and therefore could not approve related-party transactions. J.A. 111a-112a. Audit committee members testified that they did not know about, much less approve, the payments. J.A. 104a-107a, 113a-115a, 123a-125a. In any event, no individual non-competition agreements were ever executed, so any board authorization of "noncompete agreement[s]" (J.A. 382a) could not have authorized the payments.

Black's Obstruction of Justice. As the fraud scheme came to light, the SEC, as well as law enforcement authorities and a federal grand jury, opened investigations into petitioners' conduct. Black was aware of those proceedings. Although many documents had already been subpoenaed, on approximately May 19, 2005, the SEC sought additional documents from Black. On May 20, Black, along with his personal assistant, removed 13 boxes of documents from his office at 10 Toronto Street containing files that included documents relevant to the pending proceedings. After his assistant contacted Black to inform him that she had been prevented from removing the boxes, Black drove to the building with his chauffeur and parked in a location where he did not typically park. Black, his assistant, and the chauffeur then removed the boxes from a back stairway. A security video showed Black pointing out cameras in certain parts of the building. Unbeknownst to Black and his assistant, another video camera had just been installed the day before and captured Black removing the boxes. Pet. App. 12a; 2007 WL 3254452, at *13; Gov't C.A. App. 273-276, 284, 312-316, 318, 639, 646, 654; 5/31/07 Tr. 11,413, 11,500, 11,506.

2. *The Charges.* Petitioners were charged with, among other crimes, multiple counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Pet. App. 24a-121a. Section 1341 criminalizes the use of the mail to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. The indictment alleged, and the govern-

ment proceeded, on two overlapping theories of mail fraud: (1) that petitioners stole money from Hollinger by fraudulently paying themselves bogus and unapproved non-competition payments; and (2) that, in making the payments to themselves and failing to disclose them, petitioners deprived Hollinger of their honest services as managers of the company. Pet. App. 26a-30a, 35a-36a, 45a-47a, 52a-53a.

The Jury Instructions. The district court instructed the jury that it could find petitioners guilty of mail fraud if it concluded that they participated in a scheme either "to obtain money or property by means of materially false pretenses, representations, or promises," or "to deprive Hollinger International and its shareholders of their intangible right to the honest services of the corporation's officers, directors and/or controlling shareholders." J.A. 335a. On the honest-services theory, the court instructed on three central elements: (1) breach of a duty of loyalty; (2) intent to defraud, and (3) materiality. The court explained that, to establish petitioners' guilt under the honest-services theory, the government had to prove that they misused their positions "for private gain for [themselves] and/or a co-schemer" by knowingly and intentionally breaching their fiduciary "duty of loyalty" to Hollinger. J.A. 335a-336a. The government also had to prove, the instructions stated, that petitioners acted with "intent to defraud," J.A. 334a, which meant "the intent to deceive or cheat," J.A. 338a. "Good faith," the court stated, was "inconsistent" with such an intent, and the government had to negate good faith. J.A. 339a. The court further instructed that, as an element of mail fraud, petitioners' misrepresentations or omission had to be "material," J.A. 338a, which required that they had a natural tendency to influence, or the

capacity to influence, "the decision of the decision-making body to which [they were] addressed." *Ibid.*

The Verdict Forms. The government asked the district court to require special verdicts by which the jury would indicate, if it found petitioners guilty, on which theory (money-or-property fraud, honest-services fraud, or both) the jury had relied. Petitioners opposed special verdicts. Instead, they proposed that the court adopt a bifurcated procedure under which the jury, if it returned a guilty verdict on any fraud count, would be sent back to the jury room to answer special interrogatories about the basis for the verdict. The district court rejected petitioners' proposal for post-verdict special interrogatories. Given petitioners' opposition to a special verdict form, the government withdrew its request for one. The district court used only a general verdict form. Pet. App. 11a, 222a-228a; J.A. 429a-435a.

The Verdict. The jury found petitioners guilty on three mail fraud counts—Counts 1 and 6, which involved the APC payments, and Count 7, which involved the Forum/Paxton payments. See 2007 WL 3254452, at *3; Pet. App. 53a-54a, 57a-59a. The jury also found Black guilty of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). 2007 WL 3254452, at *3. The district court subsequently granted Kipnis's motion for judgment of acquittal on Count 7. *Id.* at *11.

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-17a. As relevant here, the court rejected petitioners' contention that the jury instructions on honest-services fraud were deficient because they did not require a finding that the bogus non-competition agreements contemplated a private gain at the expense of Hollinger, as opposed to a private gain at the expense of the Canadian government. *Id.* at 6a. The court ex-

plained that harm to the person or organization to whom honest services are owed inheres in the deprivation of honest services, whether or not financial harm ensues. *Ibid.* To illustrate, the court described a paradigm honest-services fraud, in which a judge takes bribes from litigants, thereby depriving the public of "honest adjudication service[s]." *Id.* at 6a-7a (citation omitted). Similarly here, the court explained, petitioners deprived Hollinger of their honest services, even if "the inducement was the anticipation of money from a third party (the anticipated tax benefit)." *Id.* at 7a.

The court of appeals also noted that petitioners' "honest services fraud bleeds into money or property fraud." Pet. App. 8a. The court explained that, if petitioners had "disclosed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net [them] a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees." *Ibid.* The court added that petitioners' conduct, which included causing Hollinger to make false SEC filings to cover up their scheme, was "bound to get [the] corporation into trouble with * * * the SEC." *Id.* at 9a.

The court further held that, even if the honest-services instruction was incorrect, the error was harmless. Pet. App. 9a. The court explained that the government "did not ask the jury to convict" petitioners of honest-services fraud based on "private gain * * * at Canada's expense." *Id.* at 10a. Rather, the government's theory was "that [petitioners] had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete." *Ibid.* Accordingly, the court concluded, if

the jury had believed that the payments were actually management fees owed to petitioners, it would have acquitted them. *Ibid.*

The court of appeals also held, in the alternative, that petitioners "forfeited" their challenge by objecting to the government's request for special verdicts that would have required the jury to state whether, if it found petitioners guilty, it had done so based on property fraud, honest-services fraud, or both. Had the jury been so instructed, the court reasoned, petitioners' challenge to the honest-services instructions may have been "moot." Petitioners' opposition to a verdict form that could have avoided error, the court concluded, constituted a forfeiture of their right to claim that type of error on appeal. Pet. App. 10a-11a.

SUMMARY OF ARGUMENT

I. Honest-services fraud does not require proof, in the private or public sectors, that the defendant contemplated economic harm to the person to whom honest services were owed.

The statute defines a fraud offense in the deprivation of "the intangible right of honest services." 18 U.S.C. 1346. That language directly responded to *McNally* v. *United States*, 483 U.S. 350 (1987), in which the Court invalidated an honest-services conviction and held that the mail fraud statute is limited to the protection of property rights. The statute takes meaning from the decision it was designed to reverse: Section 1346 defines an offense whose essential elements correspond to the scheme involved in *McNally* itself. Thus, honest-services fraud requires a breach of the fiduciary duty of loyalty, carried out with an intent to deceive, on a material matter. As before *McNally*, that form of miscon-

duct may be prosecuted in both the private and the public spheres; the statutory text makes no distinction.

Under a correct interpretation of the statute, petitioners' convictions must stand. The jury instructions contained all of the critical elements of honest-services fraud: breach of the duty of loyalty; intent to deceive; and materiality. And petitioners' self-dealing scheme to pay themselves millions of dollars in the guise of non-competition agreements satisfied those elements. That is true regardless whether the scheme involved theft from Hollinger, as the government argues and the evidence established, or only the reclassification of management fees as non-competition payments—with all the risks to Hollinger that deceit entailed—in order to obtain a personal tax benefit, as petitioners contend.

Petitioners' purported "contemplated economic harm" requirement finds no support in the statutory text. Congress's omission of such an element makes sense because Section 1346 adds a distinct, non-property basis for fraud liability. Imposing petitioners' requirement would render Section 1346 largely insignificant. When a private-sector defendant contemplates economic harm, he can usually be prosecuted under a money-or-property theory. And if petitioners' contemplated-economic-harm requirement were applied to public-sector defendants, it would defeat the statute's essential purpose—to prosecute corrupt or deceptively self-dealing public officials. Even the facts involved in *McNally* would fall outside Section 1346's reach. Petitioners do not acknowledge that implication, but their textual arguments compel it. Their new element of "contemplated economic harm" emerges from the word "defraud" in Section 1341—which applies in all mail fraud cases.

Petitioners' position also directly contradicts the drafting history of Section 1346. An earlier version of the legislation would have limited the honest-services fraud prohibition to cases in which defendant either contemplated some kind of harm (although not necessarily economic) or sought a personal gain. But Congress stripped the bill of that limiting language, instead enacting the unqualified language in Section 1346. This Court should not read into the statute a limitation that Congress rejected.

Pre-*McNally* honest-services cases also support the conclusion that contemplated economic harm is not an element of Section 1346. Although one court of appeals had adopted that requirement for private sector cases, that decision stood on its own. It created an element to address an issue that other circuits considered under the rubric of "materiality," and it limited cognizable harms to economic ones, when no other circuit had done so.

Contrary to petitioners' claim, principles of constitutional avoidance and the rule of lenity do not support their extratextual limitation. Properly construed, the elements of Section 1346 (breach of duty of loyalty, intent to deceive, and materiality) limit its application and provide intelligible bounds. "[T]he intangible right of honest services" to which Congress referred is a term of art: it invokes the doctrine that this Court had rejected in *McNally* and reinstates it in both public and private contexts. *McNally* itself provides the paradigm for such divided-loyalty cases. And courts have defined the two major categories (bribes/kickbacks and undisclosed self-dealing/conflicts-of-interest) that fall within that paradigm. Congress did not criminalize all manner of dishonesty. And disloyal agents or fiduciaries who intend to deceive on a material matter have ample notice of

their criminal conduct. No justification exists for importing a judge-made "harm" requirement that Congress did not adopt.

Even if this Court were to find fault with the jury instructions, petitioners are not entitled to a new trial. This Court should remand for the court of appeals to revisit whether any error on the mail-fraud counts is harmless beyond a reasonable doubt under *Neder* v. *United States*, 527 U.S. 1 (1999). In light of the complexity of the proceedings, that court is best situated to determine the issues. Petitioners seem to assume that, if the jury relied on the honest-services theory, the absence of a jury finding that petitioners' scheme contemplated economic harm to Hollinger compels reversal. But any rational jury would have found that petitioners' undisclosed recharacterization of management fees as non-competition payments exposed Hollinger to foreseeable economic harm, in at least two respects. First, the fraudulent scheme by senior management harmed Hollinger's reputation, thus impairing vital business relationships. Second, the false filings with the SEC threatened further economic harm by inviting shareholder or government litigation.

Finally, Black errs in arguing that, if an instructional error were harmful on the mail fraud counts, it would require reversal of his obstruction of justice conviction. That claim was never made or addressed below, and it should not be considered here in the first instance. In any event, Black cannot carry his burden to show "spillover" prejudice: any instructional error on mail fraud did not affect the evidence admitted at trial and would not have affected the jury's determination that Black endeavored to render evidence unavailable in an official proceeding.

II. Petitioners forfeited their argument based on *Yates* v. *United States*, 354 U.S. 298 (1967), by opposing special verdicts that would have revealed the basis for any conviction by the jury. Such a procedure would have raised none of the concerns that petitioners find in special verdicts; it only would have identified whether a jury that found guilt relied on a legally unchallenged money-or-property fraud theory or on the honest-services fraud theory that petitioners challenge. The Federal Rules permit district courts discretion to apply such a non-prejudicial procedure to eliminate claims of error, yet petitioners objected to this one. Forfeiture of their *Yates* claim should be the consequence, consistent with general principles of forfeiture. No defendant should win reversal of his convictions based on the impossibility of determining the ground on which the jury relied, when the defendant himself objected to a procedure that would have identified the grounds and thus eliminated the *Yates* claim.

ARGUMENT

I. A JURY FINDING THAT PETITIONERS CONTEMPLATED ECONOMIC HARM TO THEIR EMPLOYER WAS NOT NECESSARY TO SUPPORT THEIR CONVICTIONS FOR HONEST-SERVICES FRAUD

In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court rejected the unanimous view of the courts of appeals that the mail fraud statute, 18 U.S.C. 1341, protected against not only schemes for obtaining money or property, but also schemes to deprive others of intangible rights, such as the intangible right of honest services. 483 U.S. at 358; *id.* at 364 (Stevens, J., dissenting). The Court observed that, if Congress wished to expand federal fraud statutes beyond the deprivation of

property rights, "it must speak more clearly than it has." *Id.* at 360. The following year, Congress responded by restoring one such right (the very right at issue in *McNally*) through Section 1346, which states that, for purposes of the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346; see *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000) ("Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*."). Petitioners' contention (Br. 23) that honest-services fraud requires a showing of contemplated (*i.e.*, "reasonably foreseeable") economic harm to the victim lacks merit, and the claim in any event provides no basis for a retrial in this case.

A. Petitioners' Convictions Rest On Findings On All Of The Elements Of Honest-Services Fraud

Before *McNally*, the deprivation of the right of honest services was recognized as a species of fraud in both the public and the private spheres. *McNally*, 483 U.S. at 363-364 (Stevens, J., dissenting). The crime was exemplified by the conduct prosecuted in *McNally* itself. That case involved a "self-dealing" scheme in which state officials (both actual and de facto) deprived the government and citizens of the right to have government affairs "conducted honestly," by arranging to pay themselves, without disclosure to relevant state officials, a share of the commissions on sales of insurance to the State. *Id.* at 352. *McNally* thus sets forth the paradigm case of honest services fraud that Congress intended to prohibit in Section 1346: schemes involving a deceitful breach of the fiduciary duty of loyalty, in which an indi-

vidual faces a conflict between his own interests and those of the entity to whom services are owed and makes material misrepresentations or omissions to that entity. Congress intended to restore prosecutions of that form, whether the misconduct occurred in the public or private sector. The text itself makes that clear: it refers to the deprivation of "the intangible right of honest services," without differentiation of private and public contexts.

The jury instructions in this case embodied those requirements: they required an intentional breach of the fiduciary duty of loyalty; committed with intent to defraud (*i.e.*, to deceive or cheat); and involving material omissions or misrepresentations. J.A. 336a-339a. Petitioners' scheme to secretly extract money from Hollinger, disguising the payments as non-competition agreements, falls squarely within the self-dealing category of breaches of the duty of loyalty—whether the scheme involved the theft of Hollinger's money (as the government contends and the evidence established) or only the undisclosed reclassification of management fees as non-competition payments to obtain a personal tax benefit (as petitioners contend). The district court also correctly instructed the jury that it could find petitioners guilty of mail fraud only if the government proved that they had acted with "the intent to defraud," J.A. 334a, which the court defined as "the intent to deceive or cheat Hollinger," J.A. 338a. Petitioners do not challenge that instruction or contend that the evidence was insufficient to support the jury's finding that they acted with the requisite intent to deceive. Finally, the district court also gave the jury a correct instruction on materiality, which required it to find that petitioners' misrepresentations or omissions were capable of influencing Hollinger. *Ibid.* Petitioners did not take issue with the

district court's materiality instruction in either court below, and the evidence overwhelmingly supports the materiality of the omissions, even under the unwarranted assumption that petitioners believed that the payments they made to themselves were simply reclassified management fees. See pp. 42-43, *infra*.

B. The Statutory Text Does Not Require Proof Of Contemplated Economic Harm

Petitioners would add to the *McNally*-based elements described above an extra-textual requirement that, to establish honest-services fraud in the private sector, the government must prove that the defendant's scheme "contemplated some identifiable economic harm to the victim." Pet. Br. 22. That requirement confuses money-or-property fraud with honest-services fraud, and its importation into the statute cannot be justified.

1. Section 1341 prohibits any person from "devis[ing] or intend[ing] to devise" a "scheme or artifice to defraud," 18 U.S.C. 1341, and Section 1346 provides that a "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services," 18 U.S.C. 1346.[6] The text makes no mention of foreseeable or contemplated economic harm. Even courts that have adopted a contemplated-economic-harm requirement have acknowledged that the "the *literal terms*" of the statutes "do not indicate that the prosecution must prove that a fiduciary breach has

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[6] Congress enacted these provisions to protect against misuses of the mail (and, under current law, commercial carriers). Thus, the government must prove that the defendant used the United States "Postal Service," or "any private or commercial interstate carrier," "for the purpose of executing such scheme or artifice or attempting so to do." 18 U.S.C. 1341.

created a risk of economic harm to the employer." *United States* v. *Frost*, 125 F.3d 346, 368 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998); accord *United States* v. *Vinyard*, 266 F.3d 320, 326-327 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002).

The omission of a contemplated-economic-harm requirement is logical. *McNally* held that the mail fraud statute was "limited in scope to the protection of property rights," 483 U.S. at 360, and Congress responded by expanding it to the protection of "the intangible right of honest services." An economic-harm requirement would reintroduce into the mail fraud statute a variant of the very restriction that Section 1346 was designed to eliminate. Fraudulent schemes that contemplate economic harm will typically, if not invariably, involve "deprivation of money or property." *Id.* at 358. Section 1346 adds a distinct right—beyond the property right—to be protected. To construe that additional right as essentially replicating the property right that was already protected violates at least two sound principles of statutory construction: the canon against construing statutory language to be "insignificant, if not wholly superfluous," *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citation omitted), and the presumption that Congress's substantive changes to a statute are intended to have "real and substantial effect," *Stone* v. *INS*, 514 U.S. 386, 397 (1995).

To the extent that petitioners would limit the "contemplated economic harm" requirement to private sector cases, Pet. Br. 22, that limitation may give Section 1346 more practical effect, but at the cost of another textual anomaly. The text of Section 1346 draws no distinction between public-sector and private-sector honest-services cases. Although the duties and the misrep-

resentations or omissions that are material may differ in those two categories, see p. 38, *infra*, recognizing those different applications does not support creating a non-textual *element* for private-sector cases alone. The text affords no basis for that approach.[7]

2. Petitioners argue (Br. 24-28) that, because Section 1346 defines a deprivation-of-honest-services scheme as a subset of "a scheme or artifice to defraud," Congress must have wanted to limit Section 1346 to a "conventional concept of fraud," Br. 26, which, petitioners contend, requires intended or contemplated economic harm, Br. 27-28. That argument gets Congress's intent precisely backwards.

Congress did not intend prosecutions under Section 1346 to satisfy all of the conventional elements of fraud under Section 1341, plus the new elements of Section 1346. Rather, Congress enacted Section 1346 to supply what the Court found missing in *McNally*. There, the Court held that fraudulent schemes under the mail fraud statute were limited to "wronging one in *his property rights* by dishonest methods or schemes." *McNally*, 483 U.S. at 358 (emphasis added) (citation omitted). Following that decision, Congress expanded the statute to reach deceptive schemes that wronged victims in another way: by depriving them of the right to a person's

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[7] Indeed, the statutory language in which petitioners (Br. 24-28) purport to ground the contemplated-economic-harm requirement—the requirement of "a scheme or artifice to defraud"—applies to public-sector and private-sector cases alike. Although several courts have distinguished public-official from private-sector cases, see, *e.g.*, *United States* v. *deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (requiring no harm beyond the breach in public-official cases, but requiring contemplated economic harm in private cases), cert. denied, 530 U.S. 1264 (2000), they have not grounded that rule in the text.

honest services. Under that expansion, mail fraud prosecutors must still prove an intent to deceive; materiality; and use of the mails or other jurisdictional means—but the object of the fraud can now be the deprivation of honest services *or* money or property.[8] To read into Section 1346 the requirement that the defendant contemplated injury to the "property rights of the victim," Pet. Br. 23 (citation omitted), strips Section 1346 of much of its function.

That is particularly evident with respect to public-official honest-services frauds of the type at issue in *McNally*. If petitioners were correct that Congress intended Section 1346 to require proof of all the traditional elements of "fraud," Pet. Br. 27, then the statute would not even reach the scheme to defraud prosecuted in *McNally* itself. The defendants there were not shown to contemplate economic harm to the State; rather, the charged conduct involved the simple deprivation of honest services without any accompanying loss of money or property. Yet, even petitioners do not go so far as to say that the conduct of the *McNally* defendants falls outside Section 1346.

The conclusion that Section 1346 does not require proof of intended or contemplated harm does not mean that the statute lacks a specific intent requirement. On the contrary, as in all mail fraud prosecutions, in honest-

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[8] As petitioners acknowledge, because Section 1341 prohibits the scheme to defraud, not the completed crime, proof of actual pecuniary loss is not an element of money-or-property mail fraud. *Neder* v. *United States*, 527 U.S. 1, 25 (1999); see Pet. Br. 27; J.A. 339a. Under Section 1341, a defendant need only scheme to deprive another of money or property. Likewise, under Section 1346, a defendant need only scheme to deprive another of honest services; he need not actually do so.

services cases, the government must prove that the defendant acted with the intent to defraud. See *United States* v. *Weyhrauch*, 548 F.3d 1237, 1247 n.8 (9th Cir. 2008), cert. granted, No. 08-1196 (June 29, 2009); *United States* v. *Cochran*, 109 F.3d 660, 667 (10th Cir. 1997). In the context of honest-services fraud, the required intent to defraud is the intent to "deceive or cheat" the victim in order "to deprive" her of the "right to the [defendant's] honest services." J.A. 338a; see *United States* v. *Welch*, 327 F.3d 1081, 1105 (10th Cir. 2003). But the requirement that the defendant acted with intent to deceive is not tantamount to a requirement that he intended or contemplated economic harm. *Ibid.*

C. A Contemplated-Economic-Harm Requirement Would Frustrate The Purposes Of The Honest-Services Fraud Prohibition

Reading a contemplated-economic-harm requirement into Section 1346 would undermine the purposes behind the statute in two significant ways. First, a contemplated-economic-harm requirement would deprive Section 1346 of almost all practical effect, because most honest-services frauds that threaten the victims with foreseeable economic harm could be prosecuted as money-or-property frauds. Second, a contemplated-economic-harm requirement would exclude from the ambit of Section 1346 several types of honest-services fraud that Congress clearly intended to cover.

1. The degree to which petitioners' interpretation would deprive Section 1346 of practical effect is vividly illustrated by decisions of the courts of appeals that reviewed honest-services convictions following this Court's decision in *McNally*. Those courts upheld many pre-*McNally* mail fraud convictions that had been obtained

under instructions that included an honest-services theory "where the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses to the employer or to the state." *United States* v. *Asher*, 854 F.2d 1483, 1494 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989); see, *e.g.*, *United States* v. *Perholtz*, 836 F.2d 554, 558-559 (D.C. Cir. 1987); *United States* v. *Fagan*, 821 F.2d 1002, 1008-1011 & n.6 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988). Those decisions make clear that honest-services frauds that expose the victims to foreseeable economic harm often could be prosecuted as money-or-property frauds. The court of appeals here made the same essential point in noting that "honest services fraud bleeds into money or property fraud" when disclosure of a breach of duty of loyalty would lead the principal to seek a more advantageous financial deal. Pet. App. 8a ("In this case, had the defendants disclosed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net the defendants a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees."). Surely Congress did not enact Section 1346 merely to provide an additional ground on which to prosecute cases that already could have been prosecuted as money-or-property frauds.

Some courts have suggested that Section 1346 would still expand the mail fraud statute beyond frauds that could have been prosecuted under *McNally* even if honest-services fraud included a contemplated-economic-harm requirement. They reason that money-or-property fraud would remain narrower than honest-services fraud because money-or-property fraud requires proof

that the defendant "intend[ed] to inflict an economic harm upon the victim," while honest services fraud requires no such intent (even with a contemplated-economic-harm requirement). *Frost*, 125 F.3d at 369. That reasoning is incorrect. Even if money-or-property fraud requires proof of intent to cause economic harm, that intent would be established in an honest-services fraud case in which the government proved contemplated economic harm. A jury can ordinarily infer that a person intends the natural and probable results of his actions. *Agnew* v. *United States*, 165 U.S. 36, 49 (1897). When a defendant intended to deceive his employer or principal (as required to establish honest-services fraud) and he did foresee or should have foreseen that his deception could result in pecuniary harm (as required by the contemplated-economic-harm element), the jury could draw the inference that the harm was intended. Thus, if proof of contemplated-economic-harm were an element of honest-services mail fraud, Section 1346 "would have effect," if ever, "only in the rarest of circumstances," a result Congress could not have intended. *Stone*, 514 U.S. at 397.

2. At the same time, a contemplated-economic-harm requirement would exclude from coverage under Section 1346 several categories of honest-services fraud that Congress certainly intended to include. In the public sector, it would exclude what courts have universally characterized as the "core misconduct" covered by the statute—cases involving legislative votes or bureaucratic decisions paid for by bribes or based on a public official's undisclosed conflict of interest. See *United States* v. *Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008). The need for the mail fraud prohibition to cover that category of misconduct was the primary concern leading to Section

1346's enactment.[9] As members of Congress who supported Section 1346 recognized, bribe-taking and similar corrupt conduct by public officials often causes no discernible economic harm to the public. See note 9, *supra*. Public corruption therefore generally would not be criminalized under petitioners' understanding of Section 1346, even though the principal motivation for the statute was to ensure that public corruption was covered. See Citizens for Responsibility and Ethics in Washington (CREW) Amicus Br. 2.

A contemplated-economic-harm requirement would also curtail the coverage of Section 1346 in the private sector in ways that Congress likely did not intend. In commercial settings, honest-services frauds will generally threaten economic harm. That is because the consequences of fraud committed in a business setting are ordinarily business-related—*i.e.*, economic. See *United States* v. *Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999). But fiduciary or employer-employee relationships also exist outside of the business setting, for example, in medical, educational, charitable, or public-interest contexts. And, in those contexts, honest-services schemes may work significant harm to the mission of an institution, or the purpose of the relationship, even if they pose little or no direct risk of pecuniary loss.

For example, in *United States* v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), a psychologist received a financial kickback from a psychiatric hospital for referring patients, but the psychologist did not disclose that conflict to patients. The court of

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[9] See, *e.g.*, 134 Cong. Rec. 24,579 (1988) (Sen. Metzenbaum); *id.* at 23,955 (Sen. Thurmond); *ibid.* (Sen. Simon); *id.* at 23,953 (Sen. Biden); 133 Cong. Rec. 33,254 (1987) (Sen. Specter); *id.* at 21,466 (Rep. Synar); *ibid.* (Rep. Mfume).

appeals held that, although the psychologist had breached a fiduciary duty, he had not committed honest-services fraud because the scheme caused no "actual harm to the victims' tangible interests." *Id.* at 442; see *ibid.* (No patient would have considered the psychologist's conflict "material if it did not affect the quality or cost of his services to that patient.").[10] But a reasonable patient would plainly want to know that his psychologist had a financial conflict of interest before acting on his recommendation. A requirement of "harm to * * * *tangible* interests" in order to prosecute a violation of "the *intangible* right of honest services" makes no sense. The contemplated-economic-harm test should be rejected as a type of "no harm-no foul argument" that "usually fare[s] badly in criminal cases." Pet. App. 6a.

D. The Drafting History Establishes That The Honest-Services Fraud Statute Does Not Require Proof Of Contemplated Economic Harm

The drafting history of Section 1346 confirms that the statute does not require the government to prove contemplated economic harm in order to establish honest-services fraud.

Although several legislative proposals were introduced in the wake of *McNally*, Section 1346 ultimately grew out of the Anti-Corruption Act of 1988, S. 2793, 100th Cong., 2d Cong. That bill redefined a "scheme or artifice to defraud" under the mail and wire fraud statutes to include "depriv[ing] an organization of the intan-

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[10] The court added that, absent actual harm, the government had to introduce independent evidence of intent to defraud. *Jain*, 93 F.3d at 442; see also *United States* v. *Lamoreaux*, 422 F.3d 750, 754 (8th Cir. 2005). But *Jain*'s holding on materiality would seemingly foreclose a prosecution regardless of intent to defraud.

gible right of honest services in which the defendant received or attempted to receive, for the defendant or another person, anything of value *or* in which the defendant intended or contemplated loss *or* harm to the organization." *Id.* § 3 (emphasis added).

S. 2793 was passed by the Senate on October 14, 1988. 134 Cong. Rec. 31,073 (1988). That same day, the bill was also incorporated into the pending Omnibus Anti-Substance Abuse Act of 1988, H.R. 5210, 100th Cong., 2d Sess. See 134 Cong. Rec. at 30,310, 30,748, 30,766-30,768, 30,781. The Senate then passed H.R. 5210 as amended, and transmitted it to the House. *Id.* at 30,826. The House amended the honest-services provision by removing limitations in the Senate version, including the reference to "contemplated loss or harm," and adopting instead the more expansive language that now constitutes Section 1346. See *id.* at 33,150, 33,250, 33,318; Anti-Drug Abuse Act of 1988, H.R. 5210 § 7603(a) (as passed by the House, Oct. 21, 1988). The broader language passed both the House and the Senate as part of the Anti-Drug Abuse Act on October 21, 1988, 134 Cong. Rec. at 32,678, 33,318, and it was signed into law by the President on November 18, 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

Even on its own terms, the Senate version of the honest-services provision does not support petitioner's proposed limitation on honest-services fraud. By referring broadly to "loss *or* harm," the Senate bill indicated that *any* kind of contemplated harm, not just pecuniary loss, would bring a defendant's fraudulent scheme within the coverage of the statute. S. 2793 § 3 (emphasis added). The Senate language also did not require proof of contemplated harm if the defendant "received or at-

tempted to receive * * * anything of value." *Ibid.* Instead, under the Senate version, a defendant would violate the law if he *either* sought a thing of value through his fraudulent conduct *or* contemplated that his conduct would cause his employer harm, which did not have to be economic in nature.

But quite apart from the Senate bill's failure to embody petitioners' requirement, the Senate bill did not pass. To the contrary, Congress stripped the bill completely of the limiting language and enacted a statute without any requirement that the government prove either attempted gain or contemplated harm. Congress thus plainly did not intend to adopt the more stringent contemplated-*economic*-harm requirement advocated by petitioners. Their suggestion (Br. 36-37) that Congress's deletion of the limiting language in the Senate bill should be read as an implicit adoption of the deleted limitation is contrary to both common sense and this Court's cases. The Court has repeatedly refused to conclude that Congress "intend[ed] *sub silentio* to enact statutory language that it ha[d] earlier discarded in favor of other language." *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 442-443 (1987); *e.g.*, *Doe* v. *Chao*, 540 U.S. 614, 622-623 (2004); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

E. Pre-*McNally* Case Law Does Not Support Requiring A Jury Finding That The Defendant Contemplated Economic Harm

Petitioners contend (Br. 28-32) that a contemplated-economic-harm requirement is required by the pre-*McNally* cases concerning honest-services fraud. Although Section 1346 does draw meaning from the doctrine this Court rejected in *McNally*, petitioners mis-

construe that doctrine. With one exception, the pre-*McNally* cases rejected the suggestion that honest-services fraud requires proof of contemplated *economic* harm (as opposed to other forms of harm). And the cases (again with a lone exception) do not indicate that foreseeable harm is an independent element but instead find it in the traditional element of materiality.

1. The language of Section 1346 must be understood in light of the *McNally* decision itself. "[T]he intangible right of honest services" to which Congress referred is a term of art: it invokes the doctrine that this Court had rejected in *McNally* and reinstates it in both public and private contexts. As the Second Circuit has explained, "[t]he definite article 'the' suggests that 'intangible right of honest services' had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing [mail fraud] * * * schemes to deprive others of *that* 'intangible right of honest services[]' which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be." *United States* v. *Rybicki*, 354 F.3d 124, 137-138 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004).[11]

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[11] Statements of legislators who played significant roles in the enactment process confirm that view. See, *e.g.*, 134 Cong. Rec. at 31,072 (Sen. Biden) ("[T]he committee intends, in general, that the bill be read in the context of pre-*McNally* case law."); *id.* at 33,297 (Rep. Conyers) ("This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended."). Some statements sweep more broadly and suggest that Section 1346 restored all pre-*McNally* law. *Id.* at 32,708 (Senate Judiciary Committee Section-by-Section Analysis) ("The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change."). But Congress could not have intended to restore *all* pre-*McNally* case law; lower court cases had announced conflicting rules and in some contexts had failed to clarify the scope of the doctrine. Indeed, petitioners assert

2. Petitioners attempt to extract from pre-*McNally* lower court cases a contemplated-economic-harm requirement in the private sector. Pet. Br. 28-32. The only court of appeals that had adopted this requirement before *McNally*, however, was the D.C. Circuit. See *United States* v. *Lemire*, 720 F.2d 1327, 1337 (1983) (requiring that "the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict"), cert. denied, 467 U.S. 1226 (1984). And, although the court purported to reconcile its approach with that of other courts of appeals, it made clear that its formulation "may differ" from their analysis, which focused on materiality. *Ibid.* Congress cannot be deemed to have implicitly adopted a single lower court decision—itself an outlier—as a definitive exposition of honest services fraud.

Review of decisions outside the D.C. Circuit reveals that *Lemire* was the exception, rather than the rule. The pre-*McNally* cases from the Second Circuit that petitioners cite indicate that, in order to prove that an employee defrauded his employer of his honest services, the government must show that "*some* actual harm or injury [to the employer] was at least contemplated." *United States* v. *Von Barta*, 635 F.2d 999, 1006 n.14 (1980) (emphasis added), cert. denied, 450 U.S. 998 (1981); see *United States* v. *Dixon*, 536 F.2d 1388, 1399

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that the "intangible right of honest services" "had no settled or well-known meaning" as applied to private-sector conduct (Br. 25), and their contemplated economic harm test is itself an outlier. Rather, Section 1346 covers what had emerged before *McNally* as paradigm cases of deceptive breaches of loyalty in both the public and the private sectors, on which the courts had reached general consensus. See CREW Amicus Br. 18-20 & nn.9-10.

n.11 (1976) (Friendly, J.). But, unlike the D.C. Circuit in *Lemire*, the Second Circuit did not state that the harm must take an economic form.[12] Likewise, the Seventh Circuit in *United States* v. *Feldman*, 711 F.2d 758, 763, cert. denied, 464 U.S. 939 (1983), and the Fifth Circuit in *United States* v. *Ballard*, 663 F.2d 534, 540 (Unit B Dec. 1981), modified on reh'g, 680 F.2d 352 (Unit B 1982) (per curiam), required a showing of some possible "harm" or "possible detriment" to the employer, but not necessarily economic harm. Because these cases involved fraudulent conduct in a commercial or financial setting, the courts' analyses naturally focused on economic harm. But the cases do not support the conclusion that a contemplated-*economic*-harm requirement was an established element of pre-*McNally* honest-services doctrine.[13]

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[12] The language in *Dixon* cited by petitioners (Br. 28) appeared in a footnote supporting Judge Friendly's observation that no case "ha[d] sustained a conviction for mail fraud on the basis of nothing more than the failure to mail a correct proxy solicitation where this was not in furtherance of some larger scheme contemplating pecuniary loss to someone or direct pecuniary gain to those who designed it." 536 F.2d at 1399. As *Dixon* made clear, however, the scheme before it failed because, *even if* public-official mail-fraud cases, which did not require economic harm, applied to private-sector frauds, Dixon's conduct (unlike those cases) lacked "an element of corruption." *Id.* at 1401. The court thus did "not consider whether the doctrine of [those] cases should be carried over into the private field." *Ibid.*

[13] Contrary to petitioners' contention (Br. 31-32), this reading of pre-*McNally* case law is consistent with the government's brief in *Carpenter* v. *United States*, 484 U.S. 19 (1987), which endorsed pre-*McNally* cases requiring that the fraudulent scheme "contemplate[] some sort of harm to the principal," and cited the statement in *Lemire* that "an identifiable harm to [the employer], apart from the breach itself, [must be] reasonably foreseeable." U.S. Br. at 19-20, *Carpenter*, *supra* (No. 86-422) (quoting *Lemire*, 720 F.2d at 1337). Nowhere did the brief

Indeed, other cases from each of these circuits indicated that the harm contemplated by honest-services schemes need not be economic. In *United States* v. *Newman*, 664 F.2d 12 (1981), the Second Circuit ruled that "[t]he district court erred in holding that, in every mail fraud case based upon a breach of fiduciary duty by a private employee, there must be proof of 'direct, tangible, economic harm to the victim, actual or contemplated.'" *Id.* at 20. The Seventh Circuit also stated that it was "not persuaded" that honest-services fraud, in either the private or the public sector, embodies a contemplated-economic-harm requirement. *United States* v. *Castor*, 558 F.2d 379, 383 (1977), cert. denied, 434 U.S. 1010 (1978). And the Fifth Circuit, in a private sector case, had stated that "a scheme to defraud need not necessarily contemplate loss of money or property to the victims." *United States* v. *Curry*, 681 F.2d 406, 410 (1982). See also *United States* v. *Price*, 788 F.2d 234, 237 (4th Cir. 1986) (rejecting "economic injury" requirement in prosecution of union officials), vacated *sub nom. McMahon* v. *United States*, 483 U.S. 1015 (1987); *United States* v. *Venneri*, 736 F.2d 995, 996-997 (4th Cir.) (rejecting contemplated-economic-harm requirement under plain-error standard), cert. denied, 469 U.S. 1035 (1984).

3. In addition, apart from *Lemire*, see 720 F.2d at 1338-1339, the pre-*McNally* cases did not suggest that potential harm was an independent element that required a separate jury instruction and finding. Rather, they suggest that contemplated harm would be established by a jury finding that the deception was material,

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state that the pre-*McNally* cases required the "contemplated harm" to be pecuniary.

which is required in honest-services cases, as in mail fraud generally.

The traditional fraud element of materiality is an element of all mail fraud offenses. *Neder* v. *United States*, 527 U.S. 1, 25 (1999). To establish materiality in the honest-services context, the government must prove that the misrepresentation or nondisclosure had "the natural tendency to influence or is capable of influencing the employer to change his behavior." *Rybicki*, 354 F.3d at 145 (citation omitted); see *Neder*, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts § 538, at 80 (1977)). A misrepresentation or nondisclosure would influence an employer to change his behavior only if a different course of conduct would enable the employer to obtain some benefit or to avoid some injury. See *Rybicki*, 354 F.3d at 146 (preferring traditional materiality test to the "*ipse dixit*" "'non-*de minimis* reasonably foreseeable harm' test").[14]

The Fifth Circuit's pre-*McNally* decision in *Ballard* expressly connected proof of materiality and contemplated harm. Although requiring "some detriment to the employer" when an honest-services prosecution rested on an employee's fiduciary breach, 663 F.2d at 540, the court stated that "[t]he possible detriment" derived from "a violation of the employee's duty to disclose *material* information to the employer," *id.* at 540-541 (emphasis added). The court reversed the convictions of several of the defendants because, in the absence of potential harm to their employers, the evidence did not

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[14] Contrary to petitioners' view (Cert. Reply Br. 7), the traditional materiality requirement does not permit prosecution of "trivial" frauds. Rather, while screening out unimportant breaches in trivial transactions, it preserves protection when matters are important for non-economic reasons. See pp. 25-26 & note 10, *supra*, and p. 38, *infra*.

satisfy the "traditional definition" of "materiality," which the court stated is met "whenever an employee has reason to believe that the information would lead a reasonable employer to change its business conduct." *Id.* at 541 & n.17. Other pre-*McNally* cases also connected proof of materiality to potential harm, although less explicitly. See, *e.g.*, *United States* v. *Silvano*, 812 F.2d 754, 759 (1st Cir. 1987) (noting the potential-harm requirement but holding that "an employee's breach of a fiduciary duty falls within the strictures of the [mail fraud] statute when it encompasses the breach of a duty to disclose material information to the employer"); *Von Barta*, 635 F.2d at 1005-1006 & n.14 (same).

In sum, the pre-*McNally* cases do not suggest that honest-services fraud has an independent element of harm (let alone economic harm). Instead, those cases support the presumption that Congress intended honest-services fraud, like other mail fraud to include the traditional element of materiality, which embodies a related concept to contemplated harm, but delineates it in a significantly different manner.

F. Neither Constitutional Avoidance Nor The Rule Of Lenity Supports A Contemplated-Economic-Harm Requirement

1. A contemplated-economic-harm requirement is not necessary to avoid "serious constitutional questions." Pet. Br. 37. Petitioners argue that, without that limitation, Section 1346 would constitute "an open-ended delegation of authority to the courts to develop common-law crimes," in violation of separation-of-powers principles, *ibid.*; "federalize vast areas of the law of fiduciary obligations," in violation of principles of federalism, Br. 40; and sweep so broadly and vaguely as to "deprive[]

the citizenry of the fair notice required by due process," Br. 41. Those contentions all rest on the erroneous premise that, without a contemplated-economic-harm requirement, Section 1346 will criminalize "all manner of 'dishonesty' in the private sector," Br. 37, including "mere breaches of workplace rules," Br. 27. Contrary to that premise, honest-services fraud is inherently limited in ways that clarify its scope and narrow its application. Therefore, no serious constitutional questions of vagueness, delegation, or federalism exist.[15]

Honest services fraud contains three basic non-jurisdictional elements: (a) a breach of the duty of loyalty; (b) intent to deceive; and (c) materiality.

Duty of Loyalty. Schemes to deprive others of "the intangible right of honest services" include only those in which an agent (or someone who owes a comparable duty of loyalty) secretly breaches that duty by acting in his own interests while purporting to act in the interests of his principal. See *Weyhrauch*, 548 F.3d at 1247; *Rybicki*, 354 F.3d at 141-142. An agent's action to further his own interests while feigning loyalty to his principal is a classic form of fraud. See *United States* v. *O'Hagan*, 521 U.S. 642, 653-654 (1997).

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[15] Nor does Section 1346, interpreted without a contemplated-economic-harm requirement, raise serious Commerce Clause issues. Contra Pet. Br. 40. Sections 1341 and 1346 criminalize honest-services frauds only if they use either the United States postal system or a "private or commercial interstate carrier." 18 U.S.C. 1341. The federal interest in protecting the postal system justifies criminalizing schemes involving the United States mail. See *Badders* v. *United States*, 240 U.S. 391, 393 (1916). And Congress's authority under the Commerce Clause empowers it to "protect the instrumentalities of interstate commerce," *United States* v. *Lopez*, 514 U.S. 549, 558 (1995), including private or commercial interstate mail carriers, see *United States* v. *Gil*, 297 F.3d 93, 100 (2d Cir. 2002).

While *McNally* itself exemplifies the equation of "honest services" with the duty of loyalty, 483 U.S. at 355, other pre-*McNally* cases illustrate the two general categories involving breaches of this duty: cases involving bribes or kickbacks and cases involving self-dealing or taking official action while operating under an undisclosed conflict of interest. See *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 942-943 (9th Cir. 2009), petition for cert. pending, No. 09-5076 (filed June 29, 2009); *Weyhrauch*, 548 F.3d at 1247; *Rybicki*, 354 F.3d at 139-141. In the bribery/kickback cases, an employee or public officer generally accepts a payment from a third party in exchange for performing his employment or public duties in a manner favorable to the third party. In the self-dealing/conflict cases, an employee or public officer generally takes action within the scope of his official duties that furthers his undisclosed personal interests.

By limiting actionable honest-services schemes to those involving undisclosed breaches of the duty of loyalty, Congress ensured that Section 1346 does not criminalize "all manner of 'dishonesty.'" Pet. Br. 37. For example, the statute does not cover "the employee who phones in sick so he can go to a ball game," *id.* at 40; nor does it cover a public official (or private executive) who "attempt[s] to use the prestige" of his position "to obtain a restaurant table without a reservation," or who recommends an unqualified friend for a contract (but exercises no authority to direct the contract to him), *Sorich* v. *United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). Instead, the statute criminalizes only schemes in which an employee or public officer secretly takes official action to further his

own interests while pretending to act in the interests of those to whom he owes a duty of loyalty.

Intent to Deceive. This Court has recognized that a specific intent requirement goes far towards eliminating constitutional concerns of the kind petitioners raise, regarding vagueness and lack of fair warning. *Colautti* v. *Franklin*, 439 U.S. 379, 395 & n.13 (1979); *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945) (plurality opinion). Section 1346's requirement that the defendant have the specific intent to deceive serves that purpose here. Section 1346 does not cover an employee who fails to disclose a conflict of interest because he is unaware of his disclosure duty; nor does it cover an employee who engages in self-dealing with his employer's knowledge or without any intent to mislead. For that reason, petitioners err in asserting that honest-services fraud reaches "*any* breach of a duty of loyalty in the private employment context" or any "violation of Delaware fiduciary rules." Br. 41-42 (citation omitted). Only if the defendant acted "knowingly, with the intent to deceive or cheat" (J.A. 338a) may he be convicted.[16] For example, in *United States* v. *McNeive*, 536 F.2d 1245 (8th Cir. 1976), the court reversed the honest-services conviction

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[16] Petitioners' jury was instructed that honest-services fraud requires proof of "the intent to deceive or cheat," and it was also instructed that a breach of fiduciary duty "does not, in and of itself, amount to a violation of the mail or wire fraud statute"; thus, even for a scheme to breach such a duty, "you must still determine whether the government has proven all of the elements of the crime charged beyond a reasonable doubt." J.A. 338a. See *United States* v. *Bush*, 522 F.2d 641, 648 (7th Cir. 1975) (Breach of duty "alone could never be considered a crime under the mail fraud statute. It is only when [the] failure to provide honest and faithful services is combined with material misrepresentations * * * and * * * active concealment that an illegal fraud occurs."), cert. denied, 424 U.S. 977 (1976).

of a public employee who had accepted small, unsolicited gratuities because he "did not materially misrepresent the existence or nature of the gratuity practice" or "actively conceal[] his activity" and he therefore lacked "the requisite intent to defraud." *Id.* at 1252.

Materiality. The materiality element requires that the defendant's deceptive conduct be capable of influencing the victims to change their behavior. *Neder*, 527 U.S. at 22-23; J.A. 338a. As discussed earlier, that requirement limits the offense to deceptive breaches of duty that have a sufficient level of importance to the conduct of the relevant victim's affairs. In commercial settings, the affairs of the victim typically involve business decisions, and undisclosed facts in that context will ordinarily be important because of their economic significance. The significance can be either direct or indirect. A business is harmed directly if an employee takes kickbacks to favor particular suppliers who would otherwise be willing to sell their goods to the principal at a lower price. See Pet. App. 8a. A business may also be harmed indirectly if its reputation for integrity suffers from the deceptive self-dealing of an agent; that harm may jeopardize the business's ability to bid for government work or win the trust of consumers or business partners. But, in other settings, the materiality standard provides necessary flexibility that petitioners' contemplated-economic-harm standard would not. In the non-profit and public sectors (and even in some cases involving private businesses), honest-services schemes may pose no clearly identifiable economic harm but nonetheless threaten significant non-economic harm. The materiality standard ensures that the statutory prohibition captures those "cases of non-economic, yet serious, harm." *Rybicki*, 354 F.3d at 146.

In combination, those elements define a core crime of honest-services fraud that requires no additional nontextual elements to alleviate vagueness issues. Especially since "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand," *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982), any lingering concerns about doubtful applications should be addressed on particular facts, not by judicial amendment of the statute.

2. The rule of lenity likewise does not support a contemplated-economic-harm requirement. Contra Pet. Br. 43-44. The rule of lenity applies only when the text contains a "grievous ambiguity," such that, "after seizing upon everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted); accord *Dean* v. *United States*, 129 S. Ct. 1849, 1856 (2009) ("The simple existence of some statutory ambiguity * * * is not sufficient to warrant application of the rule, for most statutes are ambiguous to some degree.") (quoting *Muscarello*, 524 U.S. at 138).

Section 1346's core coverage is clear: to prohibit schemes of the type considered by this Court in *McNally*, whether public or private. Prosecutions that go beyond that scope can be addressed in specific cases. See, *e.g.*, *United States* v. *Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (IRS employee's unauthorized accessing of income tax files in disregard of IRS rules was not honest services fraud.); *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978) (Legislator's acceptance of fees for making referrals to state contracting officials, outside of his official duties, was not honest services fraud.); *Dixon*,

536 F.3d at 1400-1401 (Officer's omissions from a proxy statement of his indebtedness to the company was not honest services fraud on shareholders, because the officer's conduct lacked any "element of corruption."). Far from showing that Section 1346 requires additional judge-made boundaries (Pet. Br. 42 n.13), these cases illuminate that enforcing the existing boundaries can provide clarity about the statute's coverage. For the reasons stated above, Section 1346, properly construed, is not ambiguous, let alone "grievous[ly]" so, on the issue of whether contemplated-economic-harm is a statutory element.

G. Petitioners Are Not Entitled To Reversal Of Their Convictions

Even if the district court should have instructed the jury that it could find petitioners guilty only if their honest-services scheme contemplated economic harm to Hollinger, they are not entitled to a new trial. If the Court finds jury-instruction error, it should remand for the court of appeals to reconsider harmless-error issues in light of this Court's clarification of the applicable legal standards. Cf. *Yeager* v. *United States*, 129 S. Ct. 2360, 2370 (2009) ("declin[ing] to engage in a fact-intensive analysis of the voluminous record, an undertaking unnecessary to the resolution of the narrow legal question we granted certiorari to answer"). Although the court of appeals in this case did conduct harmless-error analysis, Pet. App. 10a, it did so before this Court clarified that the submission of an erroneous, alternative legal theory to the jury could be harmless error and that the analysis is identical to that conducted under *Neder*. See *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curi-

am).[17] Accordingly, the court of appeals should be afforded the opportunity to "revisit its factual analysis," *Yeager*, 129 S. Ct. at 2370, in light of any newly announced legal standard by this Court. And this Court should permit the court of appeals to determine in the first instance whether Black's "spillover" prejudice argument on his obstruction conviction (Pet. Br. 47-49) was properly preserved and has any merit—a task that no court has yet undertaken. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (noting that this Court is "a court of review, not of first view" and declining to consider arguments "not addressed by the Court of Appeals").

1. In analyzing alternative-theory error for harmlessness, the ultimate inquiry is whether any error was harmless beyond a reasonable doubt. See *Neder*, 527 U.S. at 19. Petitioners argue (Br. 3, 46-47) that the court of appeals erred in concluding that the jurors must have found money-or-property fraud based on a theft theory. They argue that jurors were "not bound to accept" that theory just because the government advanced it. Br. 47. Petitioners reason that, if the jurors rejected the theft theory, they would have relied on the honest-

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[17] The court below noted that the courts of appeals were divided on whether submission of an "illegal theory" could be harmless, and it drew a distinction between "submitting a case to a jury on an erroneous theory of criminal liability" and omitting to give an unambiguously correct instruction. Pet. App. 10a. It then conducted harmless error analysis on the assumption that the latter was involved, without citing *Neder*. But this Court's decision in *Hedgpeth* clarified that "drawing a distinction between alternative-theory error and the instructional errors in *Neder* [and other cases involving omissions or misdescriptions of elements] would be 'patently illogical,'" and it held that alternative-theory error can be found harmless under the *Neder* analysis. 129 S. Ct. at 532 (citation omitted).

services theory, which was flawed, in petitioners' view, because of the failure to instruct the jury to find contemplated economic harm to Hollinger. See Br. 44 (Jurors could have convicted on honest-services charges based on the recharacterization of management fees as non-compete payments when "the recharacterization was accomplished without posing a foreseeable risk of economic harm to Hollinger."). But any rational jury that relied on an honest-services theory would have found that the undisclosed recharacterization of management fees as non-competition payments itself exposed Hollinger to foreseeable economic harm. Such a finding would make any honest-services instructional error harmless beyond a reasonable doubt. On remand, the court of appeals should examine that issue.[18]

The undisclosed recharacterization created two forms of foreseeable economic harm. First, when top executives of a public company secretly falsify the nature of millions of dollars in compensation in order to obtain personal tax benefit, their self-dealing risks undermining public confidence in the integrity and competence of the company's management and thereby injur-

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[18] The court of appeals should also examine petitioners' premise (Br. 47) that the jury might have rejected the theft theory on the ground that petitioners had no fraudulent intent. That premise has no factual foundation on Count 7, which involved the $600,000 in payments from the Forum and Paxton transactions. No evidence suggested that the payments represented management fees. No individual non-competition agreements were executed for the Forum and Paxton sales. And no purchaser requested any such agreements. J.A. 39a, 46a-47a, 140a-153a. Accordingly, the jury could not have found petitioners guilty on Count 7 on the theory that they secretly recharacterized management fees as non-competition payments for personal tax reasons. Rather, a rational jury must have found them guilty on Count 7 on the basis that they stole the money.

ing the company's reputation. That reputational injury can have economic repercussions by affecting the willingness of others to do business with, work for, or invest in the company.

Second, petitioners' scheme also caused Hollinger to make materially false filings with the SEC, exposing the company to SEC enforcement actions and possible shareholder lawsuits. The evidence showed that, because petitioners did not disclose their actions to the company, Hollinger did not disclose the payments in its SEC filings until April 2002. The evidence further showed that, when petitioners finally disclosed the payments, they falsely represented that the payments were for non-competition agreements, were made to satisfy a closing condition in connection with newspaper sales, and had been authorized by Hollinger's independent directors. J.A. 39a, 46a-47a, 56a-60a, 104a-107a, 113a-117a, 123a-125a, 128a-129a, 396a. As the court of appeals explained, these false filings were "bound to get [Hollinger] into trouble" regardless of whether the payments represented legitimate management fees. Pet. App. 9a. Indeed, Hollinger's own lawyers testified that SEC rules required that non-competition payments be disclosed to Hollinger's shareholders; that their nondisclosure would create a significant litigation risk for the company; and that, as early as May 2001, they had apprised petitioners of those facts. J.A. 61a-75a, 82a-94a.[19]

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[19] Hollinger's false filings unquestionably violated SEC rules, which require it to file materially accurate annual and quarterly reports. See 15 U.S.C. 78t(a); 17 C.F.R. 240.12b-20, 240.13a-1, 240.13a-13. The reports must comply with Regulation S-K, 17 C.F.R. 229.10(a)(2), which mandates disclosure of all executive compensation as well as any related-party transactions, including the "non-competition" payments to petitioners. See 17 C.F.R. 229.402, 229.404(a). These requirements

2. Petitioners further claim (Br. 47-49) that, if this Court reverses Black's fraud convictions, his obstruction conviction must also be reversed. Black has made this argument twice before, in successive applications to this Court for bail pending certiorari, which Justice Stevens denied. See *Black* v. *United States*, No. 08A1063 (June 11, 2009); Letter from the Clerk of the Court to the Solicitor Gen. (Aug. 10, 2009) (Application No. 09A144). The Court should likewise reject the claim. As the government has explained, the claim is not properly before the Court because Black failed to raise it in either court below and it was not included in the questions presented by the petition for a writ of certiorari. U.S. Mem. in Opp. at 11 n.2, 20-21, 25, *Black*, *supra* (No. 08A1063) (Bail Opp.).

The claim lacks merit in any event. Black bears the burden to show spillover prejudice. *United States* v. *Edwards*, 303 F.3d 606, 640 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003). Reversal of Black's obstruction conviction is not required to remedy "prejudicial spillover" of evidence from the fraud counts. Pet. Br. 47. All of the fraud evidence would have been admissible even if the government had charged Black with only money-or-property fraud and not honest-services fraud. Bail Opp. 21. Nor is reversal warranted

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were explained in the redacted version of the superseding information that was provided to the jury. Doc. 766-2, at 9; see Pet. App. 35a. (Unbeknownst to the jury, Hollinger's failure to disclose the non-competition payments in its SEC filings was one basis for an SEC action against Hollinger for both equitable relief and monetary penalties. See SEC's Complaint for Permanent Injunction and Other Equitable Relief ¶¶ 44-52, at 9-10, *SEC* v. *Hollinger Int'l, Inc.*, No. 04-cv-336 (N.D. Ill. Jan. 16, 2004). Hollinger consented to a judgment against it in that action which included equitable relief. See Final J. and Order of Permanent Inj. and Other Equitable Relief (Jan. 22, 2009).)

on the speculation that the jury might have reached a different verdict on obstruction if it had "know[n] that Black had not committed mail fraud." Pet. Br. 47-48. Black can show no such likelihood. Cf. Pet. App. 10a ("Had the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them."). And reversal of Black's fraud convictions for instructional error on the honest-services theory would not remotely establish that Black did not commit mail fraud. Bail Opp. 22-23. But, even assuming that it did, the obstruction count did not require proof that Black *committed* the crime under investigation; it required only that the concealment of records had the purpose of subverting an official proceeding. J.A. 342a-343a. The jury had overwhelming proof of Black's motive to undermine an inquiry into his mischaracterized payments, regardless whether that mischaracterization constitutes fraud.

Finally, petitioners' contention (Br. 49) that the government waived any objection to the obstruction argument by failing to respond to the argument in its brief in opposition lacks merit. This Court's Rule 15.2 did not require the government to respond to the argument, which was raised only at the end of a footnote to the facts section of the certiorari petition, Pet. 12 n.7, and did not bear on the correct resolution of either of the questions presented, see Pet. i. Bail Opp. 24-26.

II. PETITIONERS FORFEITED THEIR CLAIM BASED ON THE JURY'S GENERAL VERDICTS BY OPPOSING SPECIAL VERDICTS

Petitioners' convictions should be affirmed for an independent reason. At trial, petitioners objected to the

government's request that the jury return special verdicts on the fraud counts specifying whether a guilty verdict relied on money-or-property fraud, honest-services fraud, or both. Pet. App. 11a. Then, on appeal, invoking *Yates* v. *United States*, 354 U.S. 298 (1957), petitioners argued that their fraud convictions must be reversed, even if the jury relied on a valid money-or-property theory, because the general verdicts make it impossible to tell whether the convictions instead rest on the purportedly flawed honest-services theory. Pet. C.A. Br. 25-26, 52-53. As the court of appeals correctly held, petitioners forfeited that argument by objecting to the use of special verdicts. Pet. App. 11a.

A. Special Verdicts Can Avoid Reversal Under *Yates*

Yates held that a general verdict must be set aside if the jury was permitted to rely on multiple independent grounds, one of the grounds was legally flawed, and it is impossible to tell whether the jury relied on the flawed theory. 354 U.S. at 311-312; see *Hedgpeth*, 129 S. Ct. at 532. Special verdicts can avoid that problem by clarifying whether "the facts as the jury believed them to be are a legally proper basis for conviction." *Tenner* v. *Gilmore*, 184 F.3d 608, 612 (7th Cir.), cert. denied, 528 U.S. 1052 (1999). The courts of appeals have repeatedly recognized that virtue of special verdicts. See *United States* v. *Williams*, 441 F.3d 716, 720-721 (9th Cir.), cert. denied, 549 U.S. 927 (2006); *Edwards*, 303 F.3d at 642; *United States* v. *Najjar*, 300 F.3d 466, 480 n.3 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *Boots*, 80 F.3d 580, 589 (1st Cir.), cert. denied, 519 U.S. 905 (1996); *United States* v. *McNutt*, 908 F.2d 561, 565 (10th Cir. 1990), cert. denied, 498 U.S. 1084 (1991);

United States v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

Special verdicts were historically viewed with disfavor. See *United States* v. *Spock*, 416 F.2d 165, 180-183 (1st Cir. 1969). But "[o]ver the course of the last two decades, * * * '[e]xceptions to the general rule disfavoring special verdicts * * * have been expanded and approved in an increasing number of circumstances.'" *United States* v. *Stonefish*, 402 F.3d 691, 698 (6th Cir. 2005) (citation omitted; brackets in original). Today, courts routinely utilize special verdicts, including to avoid problems under *Yates*. See, *e.g.*, *United States* v. *McCourty*, 562 F.3d 458, 470 (2d Cir. 2009), petition for cert. pending, No. 09-5221 (filed July 8, 2009); *United States* v. *Irving*, 554 F.3d 64, 77 (2d Cir. 2009); *United States* v. *Masferrer*, 514 F.3d 1158, 1163-1164 (11th Cir. 2008), cert. denied, 129 S. Ct. 996 (2009); *United States* v. *Starks*, 472 F.3d 466, 470-471 (7th Cir. 2006); *United States* v. *Smith*, 413 F.3d 1253, 1277 (10th Cir. 2005), cert. denied, 546 U.S. 1120 (2006); *Stonefish*, 402 F.3d at 698-699; *United States* v. *Cianci*, 378 F.3d 71, 90-92 (1st Cir. 2004), cert. denied, 546 U.S. 935 (2005); *Edwards*, 303 F.3d at 642; *Najjar*, 300 F.3d at 480 n.3; *United States* v. *Reed*, 147 F.3d 1178, 1181-1182 (9th Cir. 1998); *McNutt*, 908 F.2d at 565.

B. By Opposing Special Verdicts, Petitioners Forfeited Their *Yates* Claim

1. By opposing special verdicts that would have obviated the *Yates* problem, petitioners forfeited their right to seek reversal based on *Yates*. Petitioners are in the same position as a defendant who, after identifying a possible error in the admission of evidence or presentation of a legal argument, opposes a proposed limiting

or curative instruction. Having bypassed the opportunity to avoid prejudice, such a defendant may not argue on appeal that reversal of his conviction is required to cure unfair prejudice. See *United States* v. *Wheeler*, 540 F.3d 683, 693 (7th Cir. 2008); *United States* v. *Bryant*, 349 F.3d 1093, 1097 (8th Cir. 2003); *United States* v. *Levy*, 578 F.2d 896, 900 (2d Cir. 1978).

2. That conclusion promotes judicial economy by preventing unnecessary appeals and retrials. *Puckett* v. *United States*, 129 S. Ct. 1423, 1432 (2009); *Wainwright* v. *Sykes*, 433 U.S. 72, 88 (1977). Here, special verdicts might have eliminated the basis for petitioners' appeal on the honest-services issue by making clear that the jury's verdicts rested on money-or-property fraud. Pet. App. 11a.

Forfeiture rules also reduce manipulation by precluding defendants from failing to object or agreeing to a procedure at trial and then invoking that procedure as a basis for reversal on appeal. See *Sykes*, 433 U.S. at 89; see also *Ohler* v. *United States*, 529 U.S. 753 (2000); *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 498 U.S. 845 (1990). As the court below observed, petitioners insisted on general verdicts in order to lay the groundwork for their *Yates* argument, which would have been foreclosed by special verdicts. Pet. App. 11a; J.A. 432a. They have therefore forfeited their *Yates* claim.

3. Two courts of appeals have applied forfeiture (or similar) rules to *Yates*-type arguments when a defendant failed to *request* a special verdict. See, *e.g.*, *Irving*, 554 F.3d at 79 (no plain error in convicting defendant both for possessing and receiving child pornography, possibly based on the same images, because defendant

failed to request "a special verdict to have the jury particularize" the images on which it relied); *United States* v. *Aguilar*, 883 F.2d 662, 690-691 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991) (by failing to request special verdicts, defendants forfeited claim that conspiracy convictions must be reversed because they may have rested on legally invalid predicate).

The argument for forfeiture is even stronger where, as here, the government requests a special verdict to protect against possible *Yates* error, and the defendant objects. See *United States* v. *Wilkinson*, 754 F.2d 1427, 1432 (2d Cir.) (by opposing government request for special verdict and failing to request jury instruction, defendant "waived" claim that conviction for operating continuing criminal enterprise must be reversed because of possibility that jury based finding that defendant managed five other participants on participants whom defendant did not manage), cert. denied, 472 U.S. 1019 (1985). Having done so, the defendant may not argue on appeal that the combination of a defective theory and the general verdict requires reversal.[20]

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[20] Petitioners' reliance (Br. 54-55) on *United States* v. *Adcock*, 447 F.2d 1337 (2d Cir.) (per curiam), cert. denied, 404 U.S. 939 (1971), and *United States* v. *Riccobene*, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983), is misplaced. *Adcock* involved only a defendant's *failure to request* a special verdict, and it rested on the Second Circuit's position that special verdicts were *per se* improper, 447 F.2d at 1338-1339, a position since abandoned, *Ruggiero*, 726 F.2d at 922-923; *id.* at 925-928 (Newman, J., concurring in part and dissenting in part). *Riccobene* involved whether the defendant's opposition to the government's request for *post-verdict* special interrogatories constituted a forfeiture. 709 F.2d at 228 & n.10. As the courts below explained, post-verdict interrogatories raise significant concerns not presented by special verdicts. Pet. App. 11a-12a, 225a.

C. A Finding Of Forfeiture Is Consistent With Applicable Law, Fairness Concerns, And The Proceedings Below

1. Contrary to petitioners' intimation (Br. 51-52), neither the Federal Rules of Criminal Procedure nor this Court's cases preclude special verdicts. The rules do not address the matter, leaving it instead to the district court's discretion in formulating what are effectively jury instructions. *Reed*, 147 F.2d at 1180. Nor does *Stein* v. *New York*, 346 U.S. 156 (1953), overruled on other grounds by *Jackson* v. *Denno*, 378 U.S. 368 (1964), disallow special verdicts in federal criminal cases. *Stein* concerned whether a trial jury may determine the voluntariness of a confession in a state case. *Stein's* comments on federal practice are dictum. And its observation that, at that time, "no general practice of [using special verdicts] ha[d] developed in American criminal procedure," *id.* at 178, is outdated.

2. Petitioners argue (Br. 52-53, 55-56) that special verdicts would have prejudiced them. They assert that special verdicts can interfere with the jury's "historic function" of "tempering" the law with "common sense." Br. 52 (quoting *United States* v. *McCracken*, 488 F.2d 406, 418 (5th Cir. 1974)). But nothing in the government's proposed special verdict form could have had that consequence. Only if the jury first found petitioners guilty on a mail fraud count did the form ask for the ground. J.A. 430a. The form did not require the jury to answer any question in order to acquit.

Petitioners also err in implying that special verdicts here would have "le[d] jurors through a 'step by step * * * progression'" towards a guilty verdict." Br. 52 (quoting *Spock*, 416 F.2d at 182). That concern arises only when a special verdict requires specific findings on each offense element, or makes resolution of a factual

issue determinative of guilt or innocence without regard to the offense elements. See *Ruggiero*, 726 F.2d at 927 (Newman, J., concurring in part and dissenting in part). The government's proposed special verdict form asked the jury to indicate only on which of the two general theories of mail fraud it had relied, which is not coercive. See *Reed*, 147 F.3d at 1181-1182.

Special verdicts also would not have intruded on the jury's deliberations or improperly required it to support its verdict with reasons. Contra Pet. Br. 53 (citing *Yeager*, 129 S. Ct. at 2368). The jurors were not asked to reveal conversations in the jury room, individual jurors' votes, or anything else about the process of returning their verdicts. And the jury was not required to say anything more if its verdict was not guilty. Nor would special verdicts have entailed *post-trial* judicial exploration into the jury's deliberations, the danger highlighted in *Yeager*.

Special verdicts also would not have confused the jury. Contra Pet. Br. 55-56. Petitioners' concern rests on the incorrect premise that the district court had ruled that the jury need not be unanimous on its mail-fraud theory. But the court had ruled only on the different issue of whether unanimity was required "on what particular misrepresentations were made." Pet. App. 217a. The district court later stated that it had not ruled on whether the jury needed to be unanimous in its choice of fraud theory, *id.* at 226a, and it never did. And the government's proposed special verdict form would have resolved that issue in a manner favorable to petitioners by requiring unanimity on the theory. See *id.* at 228a.

3. A finding of forfeiture would not conflict with Federal Rule of Criminal Procedure 30(d), which provides that a defendant preserves a claim of instructional

error by objecting before the jury retires. See Pet. Br. 50-51, 53. By opposing special verdicts, petitioners did not forfeit their claim that the jury instructions were erroneous. Rather, petitioners forfeited their right to rely on the *Yates* rule that any instructional error requires reversal because the jury returned only general verdicts.[21] A finding that petitioners forfeited reliance on *Yates* would not "circumvent or conflict" with Rule 30(d) by adding an additional requirement for preservation of a claim of instructional error. *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996). Instead, it would simply apply settled principles of forfeiture to the *Yates* context.

Because a finding of forfeiture here would merely apply settled forfeiture principles, petitioners claim (Br. 54) that they did not receive adequate notice of the possibility of forfeiture lacks merit—particular since they addressed that possibility at trial. J.A. 432a.

4. Finally, petitioners are mistaken in arguing (Br. 55 n.15) that they avoided a forfeiture by proposing, as an alternative to special verdicts, a "bifurcated" procedure whereby the jurors, after announcing a general verdict of guilty on any mail fraud count, would be returned to the jury room to answer special interrogatories about the basis for their decision. J.A. 433a-435a. As both courts below recognized, such a procedure is untenable because it could result in the jury's reconsidering its already-announced verdict. See Pet. App. 11a-12a, 225a; accord *Jacobs Mfg. Co.* v. *Sam Brown Co.*, 19

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[21] The court below described petitioners' opposition to the special verdicts as "forfeit[ing] their objection to the instruction." Pet. App. 11a. But the government's position was that petitioners' "*Yates* argument fails because they waived it by rejecting a special verdict form." Gov't C.A. Br. 64.

F.3d 1259, 1267 (8th Cir.), cert. denied, 513 U.S. 989 (1994), and 513 U.S. 1190 (1995). Once the district court correctly rejected petitioners' proposal, it offered them a choice between general or special verdicts. Pet. App. 225a. By opposing special verdicts, *id.* at 225a-228a, petitioners forfeited their *Yates* argument.[22]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

SEPTEMBER 2009

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[22] Petitioners suggest (Br. 55) that the government waived forfeiture because it did not insist on special verdicts after petitioners objected. Petitioners never raised that argument below. In any event, the government's action did not undo the forfeiture that resulted from petitioners' insistence on general verdicts.

APPENDIX

1. Section 1341 of Title 18, United States Code, provides:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution,

such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

2. Section 1346 of Title 18, United States Code, provides:

Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

RESPONSE

IN THE SUPREME COURT OF THE UNITED STATES

No. 08A1063

(No. 08-876)

CONRAD M. BLACK, APPLICANT

v.

UNITED STATES OF AMERICA

ON APPLICATION FOR BAIL PENDING CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States, respectfully files this memorandum in opposition to the application for bail pending this Court's review on writ of certiorari.

STATEMENT

1. Applicant was Chief Executive Officer and Chairman of the Board of Hollinger International, Inc. (Hollinger), which owns newspaper companies. When Hollinger sold one of its newspapers, it sometimes entered into a non-competition agreement under which it agreed not to operate a newspaper near the newspaper it had sold for a certain period of time after the sale. Applicant and other Hollinger executives abused that practice to pay themselves

millions in bogus non-competition fees from funds that belonged to Hollinger. Based on that misconduct and his efforts to prevent its detection, applicant was convicted of three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346, and one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). Pet. App. 1a-2a; App., infra, Exh. A at 1-4, 6.

Two of the mail fraud convictions involved $5.5 million that applicant and his co-schemers received in exchange for promises not to compete with APC, one of Hollinger's subsidiaries. Unlike other non-competition agreements executed by Hollinger, the APC agreement did not involve the sale of any newspapers, but was essentially a promise by applicant and the other executives not to compete with a company they themselves owned. No realistic prospect existed that applicant and the others would compete with APC, which owned only one newspaper in Mammoth Lake, California, a town of only 7,000. Applicant and the others did not disclose the agreement to either Hollinger's board of directors or its audit committee, which was required to approve transactions between Hollinger's executives and the company or its subsidiaries. When the payments were eventually disclosed, in Hollinger's 10-K filing with the Securities and Exchange Commission (SEC), they were described as "non-competition" payments made "in connection with the sales

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As used in this memorandum, "Pet. App." and "Pet." refer to the petition appendix and the petition in No. 08-576. "Appl." refers to the application for bail submitted to Justice Stevens.

of * * * newspaper properties" "to satisfy a closing condition," with the "approval" of Hollinger's "independent directors." Every part of that description was false. Pet. App. 2a-4a; App., infra, Exh. A at 8-10, 16.

At trial, applicant and his co-defendants argued that the $5.5 million constituted management fees legitimately owed to them but mischaracterized as non-competition payments to obtain favorable tax treatment in Canada, where applicant and other recipients lived. No document, however, indicated that the $5.5 million was ever approved by Hollinger or credited to the management-fees account on its books; the checks were drawn on APC, from which the defendants had no right to management fees; the payments were made to the defendants personally, while management fees were generally paid to a company that they owned; and the payments came from the proceeds of a newspaper sale rather than from a management-fee account. Pet. App. 3a; App., infra, Exh. A at 11-12.

Applicant's other mail fraud conviction involved the theft of $600,000 in proceeds from the sale of newspapers to two other companies. No individual non-competition agreements were executed in connection with those sales; nor did the purchasers request any such agreements. Nonetheless, applicant and his co-schemers paid themselves $600,000 from the sale proceeds without disclosing the transactions to Hollinger's audit committee. And, as with the APC payments, the payments were falsely characterized in the SEC filing

as made to satisfy a closing condition, in connection with the sale of newspapers, pursuant to non-competition agreements, and with the approval of Hollinger's independent directors. App., infra, Exh. A at 14-16.

As the fraud scheme came to light, the SEC, as well as law enforcement authorities and a federal grand jury, opened investigations into applicant's misconduct. Applicant was aware of those investigations and proceedings. Although many documents had already been subpoenaed, on approximately May 19, 2005, the SEC sought additional documents from applicant. On May 20, 2005, applicant instructed his personal assistant to remove from his office at 10 Toronto Street 13 boxes containing files that included documents relevant to the SEC and criminal proceedings. After his assistant was prevented from removing the boxes, applicant drove to the building with his chauffeur and parked in a location where he did not typically park. Applicant, his assistant, and his chauffeur then removed the boxes from a back stairway. A security video showed applicant pointing out security cameras in certain parts of the building. Unbeknownst to applicant and his assistant, another video camera had just been installed the day before and captured applicant removing the 13 boxes from the premises. App., infra, Exh. A at 26-27; App., infra, Exh. B.

2. At trial, the government presented two overlapping theories on the mail fraud charges: (1) applicant and his co-

schemers stole money from Hollinger by fraudulently paying themselves bogus non-competition payments; and (2) applicant and his co-schemers, in making the bogus non-competition payments to themselves, deprived Hollinger of their honest services as managers of the company. The district court instructed the jury that it could find the defendants guilty under either theory. App., infra, Exh. C. Because the defendants objected to the use of a special verdict by which the jury would have indicated whether it relied on the money-or-property theory, the honest-services theory, or both, the jury rendered only a general verdict. Pet. App. 10a-11a.

The jury found all of the defendants guilty of the three mail fraud counts described above and found applicant guilty of obstruction of justice, based on his removal of the 13 boxes of documents from his office. App., infra, Exh. A at 6. The district court denied applicant's motions for judgments of acquittal on the fraud counts, concluding that the evidence was more than sufficient for the jury to find him guilty on both a money-or-property fraud theory and an honest-services fraud theory. Id. at 6-16. The court also concluded that there was more than ample evidence for the jury to find applicant guilty of obstruction of justice. Id. at 23-27. The court sentenced applicant to 60 months of imprisonment on each mail fraud count and to 78 months of imprisonment on the obstruction of justice count, to be served concurrently. App., infra, Exh. B at 2.

3. Applicant filed a motion in the district court seeking release pending appeal. The court denied the motion, finding that he had not raised a "substantial question of law or fact" likely to result in reversal or a new trial. Appl. Exh. G at 1. Applicant renewed his motion in the court of appeals. The court of appeals found that he had raised a "substantial" question about the validity of two of his mail fraud convictions based on his challenge to the jury instructions on honest-services fraud. Appl. Exh. F at 1. But the court nonetheless denied bail because applicant had also been convicted of obstruction of justice and "sentenced on that count to 78 months, substantially longer than the normal course of an appeal." Id. at 2.

4. The court of appeals affirmed the convictions of applicant and his co-defendants. Pet. App. 1a-17a. The court found that the evidence was sufficient to establish "a conventional fraud, a theft of money or other property from Hollinger by misrepresentations and misleading omissions." Id. at 4a. And, because that theft was also "a misuse of [the defendants'] positions at Hollinger for private gain," the court concluded that the evidence was also sufficient to support a finding that the defendants "deprived their employer of its right to their honest services." Id. at 5a. The court also rejected applicant's challenge to the sufficiency of the evidence on his obstruction conviction, concluding that the government presented "ample" evidence that he had concealed

documents with the intent to impair their availability for use in an official proceeding. Id. at 13a.

In addition, the court rejected the defendants' contention that the jury instructions on honest-services fraud were deficient because they failed to require a finding that the defendants' fraudulent scheme contemplated harm to Hollinger. Pet. App. 6a-9a. The court further held that, even if the instructions on honest-services mail fraud were incorrect, the error was harmless. Id. at 9a-10a. The court rejected the possibility that the jury might have found the defendants guilty based solely on a finding that they fraudulently mischaracterized management fees to which they were legitimately entitled in order to gain a tax benefit in Canada. The court noted that the government did not ask the jury to find the defendants guilty of honest-services fraud based on that theory; rather, the government's theory was "that the defendants had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete." Id. at 10a. Accordingly, the court concluded, if the jury had believed that the payments were actually management fees, as the defendants argued, then it would have acquitted them. Ibid. The court of appeals also held, in the alternative, that the defendants had forfeited their challenge to the jury instructions by objecting to the government's request for a special verdict. Id. at 10a-11a.

5. This Court subsequently granted the petition for a writ of certiorari in No. 08-876, filed by applicant and co-defendants John A. Boultbee and Mark S. Kipnis. The petition presented two questions: (1) whether the jury instructions on honest-services fraud were deficient because they did not require the jury to find that the defendants contemplated economic or other property harm to Hollinger; and (2) whether the court of appeals erred in holding that the defendants forfeited their claim of instructional error because they objected to the use of a special verdict. The petition did not present any question about the validity of applicant's conviction for obstruction of justice. Nor did it present any issue relating to applicant's 78-month sentence on the obstruction conviction. See Pet. i.

ARGUMENT

BAIL SHOULD BE DENIED BECAUSE A RULING IN APPLICANT'S FAVOR ON THE QUESTIONS ON WHICH THE COURT GRANTED CERTIORARI IS NOT LIKELY TO RESULT IN REVERSAL OF ALL HIS CONVICTIONS OR A PRISON SENTENCE SHORTER THAN THE TIME IT WILL TAKE THE COURT TO ISSUE ITS DECISION

As applicant recognizes (Appl. 6), he may obtain bail only if he can show that a favorable ruling on the questions on which this Court granted certiorari would likely result in either reversal of all the counts on which he was convicted or resentencing to a prison term that will end before this Court is expected to issue its merits decision. Applicant cannot make that showing. A merits ruling in his favor will at most result in reversal of his fraud convictions, leaving his obstruction conviction intact. And

applicant cannot show that it is likely that resentencing on the obstruction conviction will result in a sentence shorter than the time it will take this Court to render its merits decision.[1] In any event, if this Court had any doubt about the length of the sentence applicant would receive on an obstruction conviction alone, the Court should not itself speculate about the likely sentence but should deny the application for bail with leave to refile in the district court, which has not yet had the opportunity to address that issue.

1. The Bail Reform Act of 1984 (Bail Act), 18 U.S.C. 3141 et seq., imposes stringent restrictions on the availability of bail pending appeal and certiorari. See Eugene Gressman et al., Supreme Court Practice § 17.15, at 884-885 (9th ed. 2007); United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985). The Bail Act mandates that a convicted criminal who has been sentenced to imprisonment remain detained pending appeal and certiorari unless he establishes that he meets specified, limited criteria. In addition to demonstrating by clear and convincing evidence that he is not likely to flee or to pose a danger if released, and that his appeal is not for the purpose of delay, he must show that his appeal raises a substantial question of law or fact likely to

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[1] Applicant is therefore not similarly situated to co-defendant Boultbee. The government consented to Boultbee's release on bail pending certiorari because Boultbee was not convicted of obstruction of justice, and therefore, unlike applicant, he satisfies the standards in 18 U.S.C. 3143(b)(1).

result in "(i) reversal; (ii) an order for a new trial; (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeals process." 18 U.S.C. 3143(b)(1)(B). See United States v. Zilligitt, 286 F.3d 128, 132-133 (2d Cir. 2002) (making clear that applicant bears the burden of proving the Section 3143(b)(1)(B) factors); United States v. Chilingirian, 280 F.3d 704, 709 (6th Cir. 2002) (same).

As Justices of this Court explained even before enactment of the Bail Act, "[a]pplications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, 'the lower court refused to stay its order pending appeal.'" Julian v. United States, 463 U.S. 1308, 1309 (Rehnquist, Circuit Justice, 1983) (quoting Graves v. Barnes, 405 U.S. 1201, 1203 (Powell, Circuit Justice, 1972)); accord McGee v. Alaska, 463 U.S. 1339 (Rehnquist, Circuit Justice, 1983); cf. Beame v. Friends of the Earth, 434 U.S. 1310, 1312 (1977) (Marshall, Circuit Justice, 1977) (when the court of appeals had denied a stay, the applicant's burden "is particularly heavy"). Applicant falls well short of demonstrating the necessary "extraordinary circumstances."

2. a. After the district court denied applicant bail pending his appeal to the Seventh Circuit, Appl. Exh. G, applicant renewed his request in the court of appeals. The court of appeals refused

bail because applicant had been convicted of obstruction of justice in addition to mail fraud. Appl. Exh. E. The court concluded that, even if it reversed applicant's fraud convictions on appeal, his obstruction sentence would keep him imprisoned past the time required to resolve the appeal. Id. at 2.

Applicant's request for bail pending certiorari should be denied as well because, even if he prevails on his challenge to his fraud convictions, he will face a sentence on his obstruction conviction longer than the time it will take this Court to issue its merits decision. The questions on which this Court granted review concern only applicant's mail fraud convictions. Pet. i. The petition for a writ of certiorari did not present any question about the validity of applicant's obstruction conviction, ibid., and this Court's decision thus will not overturn that conviction.[1] If this Court reverses his fraud convictions, applicant will be entitled to resentencing on his obstruction conviction, because his sentence on that count was based in part on grouping with the fraud counts under the Sentencing Guidelines. See App., infra, Exh. F at

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[1] Applicant asserted in a footnote to the facts section of the petition that reversal of his fraud convictions would require reversal of his obstruction conviction because of purported "evidentiary spillover" of evidence. Pet. 11-12 n.*. But applicant did not ask this Court to resolve that fact-bound claim, which would not have warranted this Court's review. See Pet. 12 n.7 (acknowledging that "the questions presented do not directly address this count"). Moreover, as explained below, applicant waived the claim by failing to raise it in the courts below, and the claim lacks merit in any event. See pp. 19-23, infra.

41; Sealed App., infra, 23; Sentencing Guidelines § 5G1.2(b) (recommending that the sentence imposed on each count "be the total punishment as determined in accordance with" the Guidelines). But applicant cannot show that, if he were resentenced on the obstruction conviction alone, his sentence would "more likely than not" be shorter than the time it will take this Court to issue its merits decision. Bilanzich, 771 F.2d at 298; see id. at 299 (holding that "likely" in Section 3143(c)(1)(B) has "its ordinary meaning of more probably than not").

In determining applicant's sentence, the district court began by calculating that, under the Sentencing Guidelines, the total offense level for the fraud counts alone was 28. App., infra, Exh. E at 41. The court next calculated that the total offense level for the obstruction count alone was 24 - a base offense level of 22, plus a two level enhancement because applicant directed others who assisted in his obstruction offense. Ibid.; Sealed App., infra, 23. The court then applied the grouping rules to arrive at a combined adjusted offense level of 28, which together with applicant's criminal history category of I, yielded an advisory Guidelines range of 78 to 97 months. App., infra, Exh. F at 41-42. The court imposed a sentence on the obstruction count of 78 months, the bottom of the Guidelines range. Id. at 113.

If applicant were resentenced on the obstruction count alone, the total offense level of 24, combined with his criminal history

category, would yield an advisory range of 51 to 63 months. See Sentencing Guidelines, Ch. 5, Pt. A. Assuming the district court again imposed a sentence at the bottom of the range, applicant's sentence would be 51 months. Thus, even assuming applicant is correct (App. 14) that when this Court issues its merits decision, he will have effectively served 32 months of imprisonment (taking into account credit for good behavior), he would still have a substantial portion of his sentence left to serve.

b. Contrary to applicant's contentions (App. 13-14), the offense level of 24 that the district court calculated for the obstruction count at the initial sentencing would not change if applicant were resentenced for obstruction alone. Applicant would not be entitled to revisit that calculation because he made no objection to it at his initial sentencing, on appeal, or in his certiorari petition. Applicant did note in his brief in the court of appeals that reversal on some counts "would require resentencing on the remaining count(s)," Pet. C.A. Br. 100, a proposition that the government does not dispute. He further stated that reversal of the fraud counts "might also alter some of the enhancements applied by the district court in calculating the guidelines recommendation, including [applicant's] obstruction conviction." Ibid. But applicant did not make any particularized challenge to any of the offense level calculations on the obstruction count, and his vague assertion did not preserve any such claim. Applicant

therefore has no right to a second bite at the obstruction apple if his mail fraud convictions are reversed. See United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996) ("A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal [where the remand did not affect it.").

Although applicant may not have had the same incentive to challenge the obstruction calculations because the obstruction count was grouped with the mail fraud counts, he still should have preserved the challenge in the district court and made the specific claim in the Seventh Circuit because it would have been relevant had the mail fraud counts been reversed. In any event, speculation about whether the lower courts would permit recalculation of the offense level for the obstruction count and how the district court might recalculate that offense level would not suffice to carry applicant's burden of showing that it is "more likely than not" that he would receive a sentence shorter than the time it will take this Court to issue its merits decision. Pilarinos, 771 F.2d at 298.

Applicant also fails to carry that burden because his arguments about the obstruction calculation are mistaken. Applicant contends (App. 13-14) that, absent an underlying fraud conviction, his base offense level for the obstruction count would be only 12 and his total offense level (after the adjustment for

his role in the offense) would be only 16. That is incorrect. As the district court recognized (see App., infra, Exh. B at 41; Sealed App., infra, 23), the obstruction Guideline, Sentencing Guidelines § 2J1.2, provides that when a defendant's obstruction offense "involved obstructing the investigation or prosecution of a criminal offense," the court should calculate the base offense level using Sentencing Guidelines § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, rather than Section 2J1.2, if Section 2X3.1 would produce a higher offense level. Sentencing Guidelines § 2J1.2(c)(1). Section 2X3.1(a)(1) provides for a base offense level six levels lower than the offense level for the criminal offense the investigation or prosecution of which was obstructed. Because, as the district court determined (see App., infra, Exh. B at 41; Sealed App., infra, 23), applicant obstructed the investigation and prosecution of mail fraud, and the offense level for that mail fraud offense was 28, the base offense level for the obstruction count would be 22. With the adjustment for his role in the offense, the total offense level would be 24.

Contrary to applicant's unsupported assertion (App. 13-14), the cross-reference to Sentencing Guidelines § 2X3.1 would still apply even though he was no longer also convicted of mail fraud. The cross-reference applies "without regard to whether [the] defendant or anybody else was convicted of the underlying offense, or whether an offense could be shown to have been committed at

all." United States v. McQueen, 86 F.3d 180, 182 (11th Cir. 1996). "[T]he point of the cross-reference is to punish more severely (and to provide a greater disincentive for) * * * obstruction[] of prosecutions with respect to more serious crimes." United States v. Arias, 253 F.3d 453, 459 (9th Cir. 2001). Thus, every court of appeals that has addressed the issue has concluded that the higher base offense level under Section 2X3.1 "must be applied without regard to the defendant's guilt on the underlying offenses." Ibid. (citing cases); see, e.g., United States v. Guam, 367 F.3d 1006, 1009 (8th Cir. 2004); United States v. Kimble, 305 F.3d 480, 486 (6th Cir. 2002); see also Rita v. United States, 551 U.S. 338, 343 (2007) (noting, in describing the application of the cross-reference to Sentencing Guidelines § 2X3.1 in a perjury case, that the "underlying offense" was a "possible violation" of a machinegun registration law).[1]

c. Applicant also suggests that, on resentencing for obstruction alone, the district court might impose "a below-Guidelines sentence on the ground that [applicant] would stand convicted of obstructing an investigation into lawful conduct." App. 14. But applicant was charged with money-or-property fraud

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[1] Applicant does not argue that the district court incorrectly calculated the base offense level (or the adjustments to the obstruction count) if the cross-reference to Section 2X3.1 applies. Accordingly, even if applicant has not already waived any such argument by failing to raise it in the courts below (see pp. 13-14, supra), he has waived the argument in this court.

as well as honest-services fraud, and reversal of applicant's mail fraud convictions because the jury received erroneous instructions on the honest-services theory would not establish that applicant's conduct was lawful. Nor is there any prospect that the district court would reach that conclusion. The district court has repeatedly held that the government presented more than sufficient evidence to establish that applicant committed conventional money-or-property mail fraud offenses. See App., infra, Exh. A at 6-12, 13-16; App. Exh. G at 5. And, at sentencing, the district court expressly found that applicant (along with his co-defendants) had defrauded Hollinger of $6.1 million. App., infra, Exh. F at 19. The court rejected applicant's argument that the AFC payments of $5.5 million were management fees that were owed the defendants and thus that the only harm to Hollinger was the improper characterization of the fees as non-competition payments. Ibid. Instead, the court adopted (ibid.) the PSR's finding that the money was an "actual loss to" Hollinger because it "would otherwise have accrued to the benefit of [Hollinger]." Sealed App., infra, 10-11. Thus, there is no reason to believe that the district court would impose a below-Guidelines sentence on the ground that applicant was not guilty of mail fraud.

Indeed, the district court's comments at sentencing indicate that the court would likely impose a sentence of at least 51 months of imprisonment if applicant were resentenced for obstruction

alone. The district court stated that applicant's obstruction was "[e]qually significant" to his fraudulent conduct in establishing the seriousness of his offenses. App., infra, Exh. E at 113. The court also relied heavily on the fact that co-defendant David Radler had received a 29-month sentence. Id. at 115. The court noted that Radler was "entitled to a lesser sentence" than applicant because Radler had cooperated with the government and that defendants who provide his level of cooperation often receive about a 50% reduction in their sentences. Id. at 115-16. Those comments suggest that the court believed that applicant's sentence should be at least double Radler's sentence, i.e., at least 58 months. Finally, in imposing a 78-month sentence, the district court stated that it "would still impose the same sentence" even if a different version of the Guidelines were applicable or different enhancements applied under the Guidelines, because that sentence was "sufficient, but not greater than necessary, to serve the goals of Section 3553." Id. at 119. Accordingly, there is no basis to believe that, if applicant's fraud convictions were reversed and he were resentenced on his obstruction conviction alone, he would receive a sentence shorter than the time it will take this Court to render its merits decision.

d. Because applicant has failed to carry his burden, this Court should deny bail. But even if this Court has any doubt that applicant's sentence on the obstruction count alone would be longer

than the time it will take the Court to render its merits decision, the Court should not grant bail based on speculation about his likely sentence. The district court is in the best position to predict applicant's likely sentence, yet that court has never ruled on the question. The district court denied applicant's request for bail pending appeal based on its conclusion that applicant had not presented a "substantial question" on the validity of his fraud convictions, Appl. Exh. G at 1-6, and the court therefore did not address the sentencing issue. After this Court granted certiorari on the validity of the fraud convictions, applicant chose to file a bail application in this Court rather than to return to the district court to give that court the opportunity to address the issue. In those circumstances, if this Court believes that applicant's entitlement to bail turns on the likely length of a sentence on his obstruction conviction alone and finds reasonable uncertainty about the likely length of that sentence, the Court should deny the application for bail without prejudice and direct that it be refiled in the district court. Cf. Sup. Ct. R. 23.3 ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof."). Alternatively, the Court could vacate the court of appeals' prior bail disposition and remand the matter for further consideration by the district court. See 28 U.S.C.

2106; cf. Ward v. United States, 76 S. Ct. 1063, 1065 (Frankfurter, Circuit Justice, 1956).

3. Applicant argues (App. 2, 10-12) that his sentence on the obstruction count should not preclude bail because, if he prevails on his challenge to his fraud convictions, his obstruction conviction will also have to be reversed. That argument is fundamentally mistaken for several reasons.

a. As an initial matter, applicant has waived any argument that reversal of his fraud convictions will also require reversal of his obstruction conviction. Applicant raised multiple challenges to all of his convictions in the lower courts, but he never argued that his challenge to the jury instructions on honest-services fraud would require reversal of his obstruction conviction. Accordingly, applicant has not preserved the argument. See United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977) (refusing to consider argument not raised in lower courts); United States v. Ardley, 242 F.3d 989, 990 (11th Cir.) (per curiam) (refusing, after remand from this Court, to consider argument not

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A grant of bail based on speculation by this Court in the first instance about applicant's likely sentence would be particularly problematic, because the Bail Act requires that an order granting bail based on a likely reduced sentence provide that the defendant's release commence only "at the expiration of the likely reduced sentence." 18 U.S.C. 3143(b)(2). Thus, in granting bail, this Court would itself have to determine the precise length of applicant's likely sentence in order to determine when he should be released. Determining that date is not a task for this Court but for the sentencer.

timely raised in the proceedings before the remand), cert. denied, 533 U.S. 962 (2001); Gibson v. West, 201 F.3d 990, 992 (7th Cir. 2000) (same).

b. In any event, the argument lacks merit. Applicant contends that reversal of his obstruction conviction would be required because of "prejudicial spillover" from purportedly inflammatory evidence introduced on the mail fraud counts. Appl. 12 (citing United States v. Rooney, 37 F.3d 847, 856 (2d Cir. 1994)). The "prejudicial spillover" doctrine recognizes that, in certain cases where a defendant has been tried on multiple counts, and his conviction on one of those counts is reversed on a ground that requires dismissal of that count, retrial may be required on other counts because of "prejudicial spillover" from evidence introduced in support of the dismissed count. See, e.g., Rooney, 37 F.3d at 854-857. Reversal is not required, however, unless the purportedly prejudicial evidence "would not have been admitted but for the dismissed charges." United States v. Prosperi, 201 F.3d 1335, 1345 (11th Cir.), cert. denied, 531 U.S. 956 (2000); see United States v. Cross, 308 F.3d 308, 317 (3d Cir. 2002); United States v. Edwards, 303 F.3d 606, 640 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); Rooney, 37 F.3d at 855-856. Here, virtually all of the evidence would have been admitted even if the government had not charged applicant with honest-services fraud.

As applicant acknowledged in his court of appeals' brief, "[t]he government's primary theory at trial" was that the fraudulent non-compete payments "were simple 'money grabs.'" Pet. C.A. Br. 32 (citation omitted) (reproduced in App., infra, Exh. F); see id. at 57 (same). The honest-services theory was an alternative to the government's principal contention that the defendants committed conventional money-or-property mail fraud. Applicant's certiorari petition did not challenge either the validity or the sufficiency of the evidence on the money-or-property theory. And virtually all of the evidence admitted on the fraud counts would have been admissible if the government had proceeded only on a money-or-property theory. Indeed, virtually all of the evidence would have been admissible even if the government had charged applicant only with obstruction of justice, because the evidence would have been relevant to prove that applicant acted with the requisite "corrupt[]" intent, 18 U.S.C. 1512(c)(1). See Fed. R. Evid. 404(b). Thus, applicant cannot show any "prejudicial spillover" requiring reversal of his obstruction conviction.

Applicant is also incorrect in arguing that his obstruction conviction cannot stand because "a jury finding that [applicant] had not committed mail fraud would have been much more likely to conclude that * * * he acted with a clean conscience rather than a corrupt intent." Appl. 12. A holding by this Court that

the jury received incorrect instructions on the honest-services theory would not require the jury to find that applicant "had not committed mail fraud." And there is no reason to think that the jury would find that applicant did not commit mail fraud, even if the honest-services theory dropped from the case entirely. As noted above, the government's primary argument has always been that applicant committed money-or-property fraud. The courts below have repeatedly held that the government presented more than sufficient evidence to prove that applicant committed money-or-property fraud. Indeed, the court of appeals even concluded that the jury "would have acquitted" applicant if it had not concluded that he defrauded Hollinger of money. Pet. App. 10a.[5]

However this Court ultimately resolves applicant's challenge to the honest-services fraud instructions, the evidence

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[5] Applicant argues (Appl. 10) that the jury's acquittals on other mail fraud charges against him show that the jury's verdict on the counts on which he was convicted could not have rested on a money-or-property theory. That argument ignores the significant differences between the two sets of charges. The charges on which he was acquitted all involved payments pursuant to actual non-competition agreements made in connection with actual sales by Hollinger of newspaper companies that it owned. App., infra, Exh. A at 8. In contrast, two of the charges on which he was convicted involved payments for a non-competition agreement with one of Hollinger's own subsidiaries that did not involve any newspaper sale. Id. The third charge involved payments that were labeled non-competition payments even though no non-competition agreements even existed. Id. at 14-15. Applicant himself stressed this distinction in his filings in the court of appeals. See, e.g., Pet. C.A. Reply Br. 4 ("[T]he jury convicted only on counts that lacked non-compete agreements connected to the sale of a newspaper; it acquitted on every count in which a non-compete payment was part of a newspaper transaction.") (reproduced in App., infra, Exh. G).

establishing his obstruction-of-justice remains the same: With full knowledge of an SEC investigation, grand-jury investigation, and criminal investigation closing in on him, applicant knowingly removed 13 boxes of pertinent documents from his Toronto office, sneaking them out the back after his assistant was prevented from removing them earlier in the day. Applicant's actions were captured on video camera and played to the jury. Both the district court and the court of appeals rejected applicant's arguments that the evidence was insufficient to prove his corrupt intent in removing the documents, App., infra, Exh. A at 26-27; Pet. App. 12a-13a, and this Court has not granted certiorari on that issue. Nothing about this Court's decision on the fraud counts will affect applicant's obstruction conviction.

c. Finally, applicant errs in contending (Appl. 2, 11) that the government waived any objection to his argument that reversal of his fraud convictions will require reversal of his obstruction conviction. Applicant notes (Appl. 10) that he raised that argument at the end of a footnote in the facts section of his petition for a writ of certiorari, and the government did not respond to the argument in its brief in opposition. Applicant therefore argues that, under Rule 15.2 of the Rules of this Court, the government has waived its right to contest the argument. That is incorrect.

Rule 15.2 provides that a non-jurisdictional "objection to consideration of a question presented" may be deemed waived if the respondent does not raise the objection in its brief in opposition. Sup. Ct. R. 15.2. The rule also provides that "the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Ibid. The rule thus requires the respondent to raise in its brief in opposition all objections to this Court's consideration of a question presented by the certiorari petition and any arguments about the scope of the questions presented. The government's argument that applicant is not entitled to bail because reversal of his fraud convictions will not require reversal of his obstruction conviction is neither an objection to consideration of any question presented by applicant's certiorari petition nor an argument about the scope of those questions. Indeed, the obstruction issue does not even bear on the proper resolution of the questions presented, which address only whether or not applicant's fraud convictions must be reversed. Accordingly, Rule 15.2 did not require the government to raise the argument in its brief in opposition.

Applicant apparently reads Rule 15.2 as if it requires the respondent to contest every misstatement of fact or law in the petition no matter how unrelated to the scope or resolution of the questions presented. That reading of the rule is not only contrary

to its text but makes no sense. Respondents would be forced to clutter their briefs in opposition with objections to statements in the petition that have little or no bearing on the issues that the Court has been asked to address. That point applies with full force here: applicant buried his comment about the obstruction count in a footnote in the fact statement, while acknowledging that "the questions presented do not directly address this count." Pet. 12 n.7. The government was not required to respond to applicant's assertion, which had nothing to do with the issues before the Court (either "directly" or indirectly).

None of the cases on which applicant relies (Appl. 2, 11) supports his reading of the rule. Instead, all three cases involve waiver of arguments directly addressing the scope or resolution of the issues on which the Court granted certiorari. See Carcieri v. Salazar, 129 S. Ct. 1058, 1068 (2009); Aetna Health Inc. v. Davila, 542 U.S. 200, 212 n.2 (2004); City of Okla. City v. Tuttle, 471 U.S. 808, 815-816 (1985). No case suggests that Rule 15.2 bars a respondent from raising an argument on an unrelated issue, such as bail, because the respondent declined to raise the argument in response to a footnote in the facts section of the petition for a writ of certiorari. Accordingly, the government did not waive its right to contest applicant's assertion that his obstruction conviction will have to be reversed if his fraud convictions are reversed.

CONCLUSION

For the foregoing reasons, the application for bail should be denied.

Respectfully submitted,

ELENA KAGAN
Solicitor General
Counsel of Record

JUNE 2009

REPLY BRIEF

No. 08A1063
(No. 08-876)

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND
MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY MEMORANDUM IN SUPPORT OF APPLICATION OF PETITIONER BLACK FOR BAIL PENDING APPEAL

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Black

INTRODUCTION

The government concedes that the three fraud counts on which Mr. Black was convicted "satisf[y] the standards in 18 U.S.C. 3143(b)(1)" for release on bail pending appeal. Bail Opp. 9 n.2. It could hardly do otherwise, because the government *consented* to minimal bail for co-petitioner Boultbee, who (for good measure) was permitted to return to his home in Canada where he now sits. The sole basis for the government's different posture on Mr. Black is that he was also convicted of a single count of obstruction of justice. The government devotes 27 convoluted pages to why it *hopes* the obstruction conviction not only will ultimately survive this Court's reversal of the fraud counts but also will result in a years-long sentence.

But the reality is quite simple: It is the government's burden to establish that the error in the fraud counts was harmless as to the obstruction conviction, and the government cannot carry that burden. The obstruction conviction rests on Mr. Black's removal of his personal effects from his Toronto office at the end of his tenancy, and a jury that knew that Mr. Black was *not* involved in a fraud, combined with the stipulation that he had already turned over to the government more than 100,000 pages of documents, would not vote to convict him of "corruptly" endeavoring to deprive the grand jury of evidence regarding his *innocent* conduct. Indeed, *even if* the obstruction conviction were to survive this Court's reversal of the fraud counts, it cannot reasonably be disputed that the sentence that was imposed on this count was based on the *fraud* counts, and that a Guidelines sentence for obstruction alone could be 15 months or lower—less than Mr. Black has *already* served. Contrary to the government's arguments, *none* of this requires this Court to engage in detailed Guidelines analyses more appropriate for district courts. Nor,

had a bail application been presented to it, would the district court be required to address these premature sentencing arguments either, though, as it happens, the government's sentencing contentions are also spectacularly wrong on their own merits. What is *currently* relevant about any future re-sentencing is also simple: prosecutors do not sentence defendants. Courts do. The government's wishful thinking about how it might leverage any possible future sentence does not control the bail analysis.

Unable to meet Mr. Black's application on the merits, the government's proffers a veritable Potemkin Village of supposed waiver rules that, the government asserts, require the conclusion that Mr. Black waived potential challenges to his obstruction conviction *and* sentence. In fact, the government now contends that even after *all* fraud convictions are reversed (and assuming incorrectly that the obstruction conviction could survive), the district judge would be *powerless* to re-calculate the offense level for the obstruction count—an offense level that was calculated *based on* those invalidated convictions. Mr. Black is stuck with that earlier calculation, so the government says, because at his sentencing hearing he did not ask the district court to predict what his obstruction sentence might be in the event the fraud counts were ultimately reversed. It would be too kind to call this argument frivolous. No court has *ever* intimated that a defendant must invite the sentencing judge to engage in a series of "what if," hypothetical calculations as to Guidelines that are, in any event, merely advisory, before the judge determines the appropriate punishment for the counts on which a sentence *will be* imposed. Were it not for the government's penchant for non-textual waiver rules, *see, e.g.*, Pet. i (presenting the question whether waiver follows from a decision not to acquiesce in the government's suggestion to use a prejudicial special verdict form), it would be remarkable that the government

even *suggests* such a burdensome and meaningless rule. The waiver rule that *does* exist, and that actually applies here because it is found in *this* Court's *written* rules, is Rule 15.2. This rule is acknowledged, almost in passing, only at the very end of the government's quite lengthy submission. It dooms the government's contentions. The government made several (meritless) arguments in its brief in opposition to certiorari to the effect that any error in the fraud counts had no injurious effect on the verdicts, but it elected *not* to take issue with petitioner's argument that such error would require reversal of the *obstruction* conviction. The government is stuck with its tactical choice.

There is no valid reason to deprive Mr. Black of his freedom pending appeal. He will have served, with credit for his good behavior, 32 months of his sentence by the end of the October 2009 Term. He has served 18 months of that sentence already. If the obstruction count survives (indeed, even if all counts survive), Mr. Black still must (and will) serve the full sentence that results from these proceedings. Mr. Black therefore is the only party who bears the risk of a "wrong" decision on his bail application—the only party in this case who stands to suffer *irreparable* harm. And the risk of such harm is significant: more likely than not a denial of bail pending appeal will subject him to substantial unjust imprisonment. Like co-petitioner Boultbee, Mr. Black should be given his liberty while their appeals are pending. Accordingly, this Court should order that Mr. Black be released on bail subject to conditions to be prescribed by the district court in keeping with those to which the government already agreed for co-petitioner Boultbee.

ARGUMENT

The Government Has Failed To Advance A Legitimate Reason For This Court To Deny Mr. Black The Same Relief As Co-Petitioner Boultbee

1. An uninformed reader of the government's opposition to Mr. Black's bail application would be forgiven for missing the fact that this Court has *already* granted certiorari. Such a reader also might not realize that, in consenting to bail for Mr. Boultbee, the government conceded that this joint appeal raises substantial questions likely to result in at least a new trial on all three fraud counts of conviction. The reason a reader might be confused is that a number of arguments and assertions of "fact" essential to the government's opposition to bail for Mr. Black could *only* be credited if certiorari had *not* already been granted *and* if the government had *not* already conceded that Mr. Boultbee meets the same statutory requirements for bail on appeal. Not the least of these inconsistencies between the government's proposed view of things and the grant of bail to Mr. Boultbee is the government's repeated incantation that the jury must have concluded that Mr. Boultbee, Mr. Black and the others schemed to defraud Hollinger of its money (not just of a right to petitioners' honest services). Bail Opp. 3-4, 5-7, 17, 23 & n.6. The government offered this up as one of its main reasons to deny certiorari. But there being no way—and no *effort*—to explain away cooperating witness David Radler's unambiguous testimony that the non-competition-agreement payments had already been approved as part of a much larger management fee, the government's opposition to certiorari failed.

With the vitality of the fraud convictions off the table, the government's bail opposition boils down to two propositions, each of which it must establish: (1) that the obstruction conviction will remain intact even if the jury was misled into believing that the conduct being investigated and prosecuted was a federal crime; and (2) that on a re-

sentencing the term of imprisonment for obstruction alone would substantially exceed the time that Mr. Black has already served. Both propositions are wrong for several independent reasons, and it is neither necessary nor appropriate to require Mr. Black to start back in the district court yet again with his arguments for why bail is warranted.

2. Only as an afterthought does the government deny it waived its new argument—that the instructional error is harmless as to the obstruction conviction. Bail Opp. 24-25. In its brief in opposition to certiorari, the government argued at great length that the error was harmless as to three of the counts and therefore did not warrant review. But for a fourth count of conviction—one that the government insists was just as serious as the other three combined (Bail Opp. 18)—it made no such claim. The petition clearly contended that if this Court rejects the Seventh Circuit's rulings on the questions presented, the judgment must be vacated as to every count, not just the fraud counts. Pet. 11 n.7. Therefore, the factual statements in the petition regarding the obstruction conviction, and the legal statements as to the prejudicial effect of the erroneous honest services instruction on that conviction, are "statement[s] of fact and law in the petition" that "bear[] on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2; *see also* Bail Opp. 25 (conceding that rule applies to statements that bear on the "scope of the questions presented"). As a result, the government had "an obligation to the Court to point out in the brief in opposition, *and not later*, any perceived misstatement" of such law or fact "in the petition." Sup. Ct. R. 15.2 (emphasis added). The government having failed to do so, its objection should be "deemed waived." *Id.*

The government insists Rule 15.2 does not apply. It contends that, unlike the issues in the Rule 15.2 cases cited in the bail application, an issue as to the scope of the

counts that would be vacated as a result of a favorable ruling on Mr. Black's questions presented does not "directly address[] the scope or resolution of the issues on which the Court granted certiorari." Bail Opp. 26. That is incorrect. Earlier this Term, the Court applied Rule 15.2 to the same types of issues. In *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009), the factual assertion in the petition (whether a particular tribe was under federal jurisdiction in 1934) could have been resolved by the Court or left to the lower courts on remand in the event petitioners prevailed on the merits. And the question presented (whether the Secretary of the Interior could take land into trust for tribes that were not under federal jurisdiction in 1934) could have been decided without the Court ruling on that factual assertion. This Court nonetheless determined, under Rule 15.2, that because the government did not challenge the statement found in the petition the statement should be accepted as true for purposes of the case. *Id.* at 1068. Likewise, the effect on the obstruction count of a favorable ruling on the questions presented addresses the scope of those questions, even though this Court could decide them before addressing that effect. Bail should be granted based on the government's waiver alone.

3. Even if the government *had* preserved its argument that the obstruction count survives independent of reversals on the fraud counts, the argument is implausible. To convict Mr. Black of obstructing justice, the jury needed to find that he acted with a "corrupt" intent when he helped safeguard his personal papers and other documents on the eve of being evicted from his office—that is, the jury had to find that he acted with the improper purpose of subverting or undermining the fact-finding functions of those investigating conduct at Hollinger. Pet. App. 242a-43a. But as the district court noted in finding that Mr. Black is not a flight risk, it was clear throughout the trial that Mr. Black

never shied away from defending the propriety of his conduct. Bail Appl., Ex. F at 46. Had the jury known that Mr. Black's protestations of innocence were not false bravado—that he had, in fact, committed *no* fraud—the prospects for conviction would have been, at the very least, highly doubtful.[1] The government, having conceded the likelihood of reversal on the fraud counts, cannot seriously contend it would be any easier for it to establish that the error was harmless as to the obstruction count.

In its effort to confront this form of prejudice as well as the prejudicial spillover from the voluminous evidence the government paraded before the jury as supposed proof of fraud, the government contends that the *same* evidence of fraud would have been admissible to prove a corrupt intent on the obstruction count. Bail Opp. 22-23. It posits that the outcome of a trial based on such proofs would have been the same, because the district court and court of appeals each reasoned that there was ample evidence of fraud by theft of money—a theory the government and the court of appeals believed so central to the verdicts that both confidently proclaimed that the jury would have acquitted had it found no fraud by theft. *Id.* at 23. The fatal flaw in these arguments is that the govern-

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[1] As noted earlier, the obstruction count was based entirely on Mr. Black's decision to move 13 boxes containing personal effects and documents from his Toronto office to his nearby home, in advance of the end of his tenancy. The government suggests that he moved the boxes—on May 20, 2005—in response to the fact that "on approximately May 19, 2005, the SEC sought additional documents from [him]." Bail Opp. 4. But the evidence at trial established that Mr. Black learned of the SEC's interest in additional documents only *after* he had moved them. His lawyers testified that *they* learned of the request in a call from the SEC on May 19 but *did not* communicate the request to Mr. Black until the week of May 23. C.A. Supp. App. 424-28. This was the SEC's *sixth* request for documents (*id.* at 150-51 (stipulation of parties)), and there was no dispute that Mr. Black had *fully* complied with all previous SEC requests—producing over 112,000 pages of documents (*id.*). In complying with those request, Mr. Black gave several lawyers the full run of the same Toronto office– for a week at a time –*and* his residence. *Id.* at 485-96. It was, at the very least, a close question whether Mr. Black harbored a corrupt intent in moving his property from office to home.

ment *already* pressed them as reasons to deny certiorari; petitioners replied that, to the contrary, the only plausible explanation for the guilty verdicts is that the jury rejected the theft theory and credited the honest services theory now under review; this Court then *granted* review; and the government has now agreed with Mr. Boultbee that the fraud counts *will* likely be reversed if petitioners prevail on the questions presented (in other words, the government concedes that any error was, in all likelihood, *not* harmless). Because the government has already lost this battle (and for very good reason), it cannot resurrect its "surely the jury must have found fraud by theft" refrain as reason to deny bail to Mr. Black and Mr. Black alone.[2]

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[2] The government notes differences between the sets of charges on which the jury convicted and those on which it acquitted. Bail Opp. 23 n.6. That is—and always has been—precisely petitioners' point. *See, e.g.*, Pet. C.A. Reply Br. 4 (found at Exh. G to Bail Opp.). The jury acquitted on all counts where non-compete agreements were entered into contemporaneously with the sale of newspapers. The government had argued that even if Hollinger knew of the existence of these non-compete agreements, the agreements really were unnecessary and worthless because the buyers of the newspapers did not care whether non-compete agreements were included in the deals. Once the jury concluded that the agreements were *not* shams, the instructions led it to reject *both* the theft *and* honest services theories for those counts. But the fraud counts on which the jury did convict were different. On counts 1 and 6, for example, even though the testimony from the government's own star witness established no intent to steal from Hollinger (because the payments had already been approved in the form of management fees), the honest services theory allowed the jury to convict if it concluded that—in contrast with the transactions for the acquitted counts—petitioners were not "entirely fair" with Hollinger in how they went about recharacterizing and describing the payments. Pet. App. 236a-237a.

The problem is that the jury was not *further* required to find, under the honest-services instructions urged by the government, that petitioners contemplated *any* economic or other property harm to Hollinger when they recharacterized the nature of the fee to pursue a lawful tax benefit in Canada. Whether the jury needed to find that petitioners contemplated such harm to those to whom they owed any duty of honest services—an issue on which the circuits are deeply split—is, of course, the primary question on which this Court has granted review.

4. Even indulging the government in its erroneous view that the obstruction conviction could survive reversal of all three mail fraud convictions, Mr. Black still meets the second independent ground for bail pending appeal: *i.e.*, it is likely his sentence for an obstruction conviction alone would be shorter than the sentence he has *already* served. Despite its novel sentencing waiver argument, the government concedes that upon reversal of the fraud convictions, Mr. Black will be entitled to resentencing on his obstruction conviction, "because his sentence on that count was based in part on grouping with the fraud counts under the Sentencing Guidelines." Bail Opp. 11. The district court's previous calculation of the offense level for the obstruction count (a level of 24) had *no* effect on the sentence, because under the grouping rules the higher offense level for the fraud counts alone determined the Guidelines range. Bail Opp. 12; Bail Appl. 12-13. The government also agrees that Mr. Black would be entitled to a redetermination of that range at a hypothesized resentencing for the obstruction count alone—and indeed it agrees that Mr. Black would need to be sentenced under a *lower* advisory Guidelines range for obstruction if the fraud counts are vacated. Bail Opp. 12-13. The government contends nonetheless that the district court would be *barred* at such a resentencing from revising its earlier offense level calculation for the obstruction count—a calculation that was completely controlled by the offense level calculation for the three fraud convictions that, under this hypothetical exercise, are assumed to have been *vacated*. The government has not a whit of support for such a bizarre result.

The government's position rests principally on a heretofore unheard of waiver rule, one that would require a sentencing judge to decide whether the advisory Guideline range might change (and, if so, how) under *each* of multiple permutations that flow from

the possible affirmance and reversal of separate counts of conviction following an appeal that the defendant, as of the time of sentencing, may or may not have decided to pursue, based on issues that he may or may not have already identified. The government insists that because Mr. Black did not ask the district court to engage in this mindless exercise, any resentencing for obstruction that is occasioned by a decision to vacate the fraud counts must proceed as if the fraud counts had not been vacated after all. Its *sole* citation for this proposition is a case that *undermines* it.

In *United States v. Parker*, 25 F.3d 442 (7th Cir. 1994), the court of appeals reversed and remanded for limited relief—imposition of sentence without an enhancement for obstruction of justice. *Id.* at 449 (agreeing with the defendant that his false statements at the plea hearing were immaterial). On remand, the district court redetermined the range by subtracting the enhancement, but it declined to consider other sentencing issues that were unaffected by that change and could have been raised at the original sentencing. On a second appeal, the court of appeals held that the defendant was properly barred from raising his stale issues on remand. *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (Posner, J.). Assuming the waiver rule articulated in *Parker* still applies now that the Guidelines are merely advisory, it would permit Mr. Black to raise any issue at a resentencing that "aris[es] out of the correction" of errors on appeal. *Id.* As explained in the bail application, and as described further below, a recalculation of the obstruction offense level after the fraud counts are vacated would "arise out of" the reversal of those counts, because the original obstruction offense level was based on the calculation for the vacated counts.

As for having adequately raised the issue on appeal, Mr. Black clearly alerted the court of appeals that a reversal of the fraud counts would require a recalculation of the obstruction sentence. The government quotes a snippet of Mr. Black's appeal brief. The passage, read in full, shows that the court of appeals had all it needed to fashion the appropriate relief on remand.

> The sentences in this case were interlinked in such a fashion that a reversal on any count or counts would require resentencing on the remaining count(s). For example, if the APC count is reversed, that would change the loss calculation dramatically for all defendants and might also alter some of the enhancements applied by the district court in calculating the guideline recommendation, including Black's obstruction conviction. And if Black's obstruction conviction is reversed, it would alter the guidelines calculation for the fraud offenses. Therefore, in the event of a partial affirmance and partial reversal, defendants request that the case be remanded for resentencing.

Pet. C.A. Br. 100. Nothing more was required. *Cf.* Bail Opp. 26 (complaining that litigants should not "be forced to clutter" their filings with objections "that have little or no bearing on the issues that the Court has been asked to address").

As the government acknowledges, the offense level that the probation department calculated for the obstruction count was governed by a cross-reference to the Accessory After the Fact Guideline, USSG § 2X3.1, because the cross-reference produced an offense level higher than the one otherwise applicable under the obstruction Guideline. Bail Opp. 15. The Accessory After the Fact Guideline calls for a base offense level six levels lower than the offense level "for the criminal offense" whose investigation or prosecution the defendant obstructed. USSG § 2J1.2(c)(1) & cmt. (backg'd.) (explaining that the cross-reference is designed to deal with, *inter alia*, those situations where the obstructive conduct is "part of an effort to avoid punishment for an offense that the defendant has committed"); USSG § 2X3.1(a)(1). Thus, the probation department recom-

mended, and the district court found, that the offense level based on the obstruction conviction should simply be six levels lower than the calculation for the fraud counts of which Mr. Black was *convicted*—or level 22.

The government argues that the cross-reference would still apply even if Mr. Black no longer stood convicted of the criminal offense whose investigation and prosecution he purportedly obstructed. Bail Opp. 14-16. This Court need not pre-judge whether the district court could (or would) still apply the cross-reference once it is determined that Mr. Black was convicted of non-criminal conduct. Even assuming the cross-reference *can* apply to the obstruction of investigations and prosecutions where the conduct in question turns out to be innocent, the cross-reference is nonetheless calibrated to the "serious[ness]" of the offense being investigated or prosecuted. USSG § 2J1.2(c)(1), cmt. (backg'd). Thus, any sentence calculation under the cross-reference to accessory after the fact to a fraud scheme would include enhancements for aggravating circumstances, if any, that actually *were present* in connection with the fraud and that the defendant *knew of*, not for aggravating circumstances that the government imagined or merely suspected.[3] *See also* USSG § 2X3.1, cmt. (n.1) (directing the court, in calculating the Guideline for

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[3] For this reason, the fact that Mr. Radler received a 29-month sentence is beside the point. Mr. Radler's sentence was based on his plea of guilty to defrauding Hollinger of more than $32 million, and his sentence calculation was premised on a loss of that size. Plea Agreement (DE 21), at 23, *United States v. Radler*, No. 05cr727 (N.D. Ill. Sept. 20, 2005) (containing stipulation that Radler's loss amount was greater than $20,000,000). The question here is the sentence Mr. Black will likely receive based on no fraud conviction at all. In any event, Mr. Radler, whom the government agreed to let serve his sentence in Canada, was released from prison after serving only 10 months. (The Canadian Parole Board decision granting Mr. Radler his release is available at www.straight.com/files/pdf/DavidRadler_parole.pdf.)

the underlying offense, to apply any specific offense characteristics "that were known, or reasonably should have been known, by the defendant").

The district court applied precisely this limitation to the cross-reference calculation after the jury acquitted Mr. Black of nine counts of fraud. It based the offense level for the obstruction count on a loss figure of $6.1 million rather than the more than $60 million in loss that would have applied under convictions on all fraud counts. Bail Opp., Exh. E at 19 & 41. If the remaining fraud counts are vacated, the 14-level enhancement for $6.1 million in loss would no longer apply, and the cross reference would not produce an offense level greater than the base offense level under the obstruction Guideline.[4]

5. The government's final position is that Mr. Black should be forced to delay his release by returning to the district court to argue that this Court's grant of certiorari warrants bail pending appeal. Even the government concedes, however, that there is no reason for such a disposition if—as we establish above—the obstruction conviction is likely to be reversed along with the fraud convictions. That is a legal issues; the Court is better positioned to apply its own waiver rule; and, as noted earlier, the lower courts' reasons for denying bail are inconsistent with this Court's decision to grant certiorari.

The district court also is no better positioned than this Court to decide whether Mr. Black qualifies for bail on the independent ground that a sentence for obstruction

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[4] It is notable, given the government's newly proposed doctrine of sentencing-related waiver, that the government did not challenge the district court's decision to tie the obstruction count offense level to the amount of loss from only those fraud counts on which the jury convicted, and not from all counts that were part of the government's investigation and prosecution. *See* Government's Consolidated Objections to Presentence Investigation Reports (DE 950), No. 05cr727 (N.D. Ill Nov. 27, 2007) (identifying only objections to the Guideline calculation under Section 2B1.1 for the fraud offenses, and not mentioning the obstruction count calculation); Bail Opp., Exh. E at 41-42 (no objection tendered to court's obstruction count offense level determination).

alone would likely be no greater than the sentence Mr. Black has already served. The arguments on this point are also grounded in legal principles—straightforward applications of the Guidelines based on how this Court would likely resolve the questions presented.[5] An appellate court determining whether to grant release pending appeal need not force the sentencing judge to engage in a full dress rehearsal of a potential resentencing. In addition, if the sentencing judge were presented with the bail application after a grant of certiorari, she would need to speculate on the determinations that were implicit in this Court's decision to grant review. That is a particularly knotty task when the grant of certiorari involves a repudiation of an earlier decision by the lower court. The district judge would need to conclude, without the benefit of guidance from this Court, that its previous views on the harmlessness of the instructional error were wrong in some significant respect, and then try to guess how that should affect the sentence for obstruction.

Now that this Court has granted review, Mr. Black's bail arguments are properly presented and decided here. The government's proposed approach would threaten to prolong his detention unduly by sending the matter back to the district court yet again with

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[5] Moreover, Mr. Black's calculation of the sentence for an obstruction conviction is overly conservative. The base offense level of 14 is derived from the Guidelines currently in effect. At sentencing for *each* of the defendants in this case the district judge uniformly, in a determination the government did not appeal, applied the version of the Guidelines in effect at the time of the conduct at issue in the fraud counts, expressly concluding that the earlier version produces sentences sufficient, but not greater than necessary, to achieve the purposes of punishment. Bail Opp., Exh. E at 10-16. The version of the Guidelines Manual that she applied calls for a base offense level of 12 for obstruction (corresponding to a range of *10 – 16 months*). Given the statutory directive to avoid unwarranted sentence disparity, *see* 18 U.S.C. § 3553(a)(6), the district judge would have good reason to apply the same version at a resentencing. After all, she concluded, in applying the earlier version before, that "it is only appropriate that the same version of the Guidelines should apply to Mr. Black as it does to Mr. Radler." Bail Opp, Exh. E at 15.

possible appeals by the government to the court of appeals and back to this Court a second time. Such an outcome is neither useful nor fair.

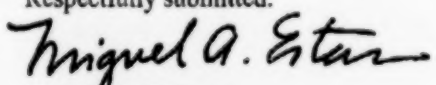
* * *

Contrary to the government's position, there is nothing extraordinary about granting bail under these circumstances. *See* Bail Opp. 10. Indeed, not a single case cited by the government deals with an application for bond *after* certiorari was granted. In each of the cases it cites, the Court denied bail *because* it concluded that a grant of certiorari was too unlikely. *See, e.g., Julian v. United States*, 463 U.S. 1308, 1309 (1983) (Rehnquist, Circuit Justice) (denying bail because the applicant did not demonstrate "a reasonable probability that four Justices [were] likely to vote to grant certiorari"); *McGee v. Alaska*, 463 U.S. 1339, 1340 (1983) (Rehnquist, Circuit Justice) (denying bail because "the probability of this Court's granting certiorari to review the judgment of the Court of Appeals approaches, if it does not actually reach, zero"); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1315 (1977) (Marshall, Circuit Justice) (denying a stay request because the balance of irreparable harm was not in applicants' favor, nor was there a likelihood that four Justices would vote to grant certiorari). What *is* unusual, if not extraordinary, is the government's opposition to bail after it has conceded the appropriateness of release for the co-petitioner, and where its arguments have been waived or are inconsistent with the fact that certiorari was granted.

CONCLUSION

For the reasons stated above and in the bail application, the Court should enter an order granting bail pending appeal and refer the matter to the district court for the sole purpose of setting, within 7 days of this Court's order, the appropriate amount of security for Mr. Black's bond, in light of the government's agreement as to co-petitioner Boultbee.

Respectfully submitted.



MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner Black

June 9, 2009

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 2 - 2009
OFFICE OF THE CLERK

No. 08-876

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
Counsel for Petitioner Kipnis

ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100
Counsel for Petitioner Black

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

MICHAEL E. SWARTZ
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000
Counsel for Petitioner Kipnis

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REPLY BRIEF FOR PETITIONERS

Our opening brief demonstrated that an intent to inflict some economic harm on the victim has long been understood as an essential part of the "intent to defraud" that the government must prove in private-sector mail fraud cases. This understanding has been reaffirmed by a majority of circuits that have considered this issue since Congress enacted 18 U.S.C. 1346 in 1988, and it is clearly inconsistent with the Seventh Circuit's view that one can be guilty of mail fraud for securing a *lawful* tax benefit in Canada without disclosing that fact to his employer.

The government contends that the majority rule unjustifiably adds a non-textual "element" of contemplated harm to mail fraud prosecutions, and proposes that the true path lies in the recognition that the 1988 Congress relied on the established element of materiality as the sole limitation on what federal prosecutors might choose to charge as "honest services fraud." This is a surprising argument, because the government argued vigorously in *Neder v. United States*, 527 U.S. 1 (1999), a full decade after Congress supposedly contemplated such a thing, that materiality (which does *not* appear in the statutory text) is *never* an element of mail fraud. The government deservedly lost that argument, but it is a bit much for it now to say that in 1988 Congress clearly relied on a requirement for which the Solicitor General could find *no* evidence in 1999.

More fundamentally, the government's argument is misdirected. Mail fraud is a specific intent crime. Petitioners do not propose to add any "elements" to

the statute; they simply insist on fidelity to a traditional understanding of "intent *to defraud*." The government, by contrast, would treat nondisclosure "frauds" as general intent crimes, in which the government's burden is fully met by showing a knowing failure to disclose—*i.e.*, the defendant knew he was not speaking. As the government sees it, anyone who stays silent in violation of a "duty" of disclosure (even one discovered post-hoc by an ambitious prosecutor) has the "specific intent" to "deceive" because, by knowingly failing to disclose, he necessarily "specifically" intends to withhold "honest services." GB 21-22.

Equally baseless is the government's insistence that this Court choose between contemplated harm and materiality. *Both* specific intent *and* materiality are mail fraud elements that the government must prove beyond a reasonable doubt. Without both, federal prosecutors would be free to federalize significant bodies of law reserved to the states, extending the statute well beyond its purposes or anything its language can constitutionally bear. The government gives short shrift to the constitutional difficulties posed by Section 1346, even though no other federal criminal statute has prompted courts to expend so much effort, in so many published opinions, grappling with those difficulties in an effort to articulate a properly limited interpretation. There is no justification for this "casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question" at issue here. *McNally v. United States*, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting).

According to the government, however, a properly limited reading of Section 1346 can be derived from *McNally*, which the government describes, at the highest conceivable level of generality, as a case involving a breached "duty of loyalty." This new manifestation of "the intangible right of honest services"—manufactured since certiorari was granted—apparently has nothing to do with Delaware law, which the government does not embrace even *once* in its merits brief even though it was a centerpiece of the trial and the yardstick by which the government urged the trial court and jury to measure petitioners' conduct. Presumably the government does not relish explaining how a twenty-year felony can be teased out of a defendant's failure to be "entirely fair" in violation of principles of state corporate law.

No reading of *McNally* can justify the manner in which the government employed Section 1346 here: to prosecute alleged "thefts" of property—which, of course, *remained* within the meaning of "scheme to defraud" after *McNally*—without the nuisance of proving each element of "theft." Congress enacted Section 1346 to cover certain *additional* "schemes" *other than* theft-by-fraud that were *excluded* from the mail fraud statute by *McNally*—primarily kickbacks and bribes where the scheme is meant to harm the victim but not to obtain money directly from *him* (the money coming from a party who is far from deceived). Congress did not pass the statute to give the government a way to call someone a thief who isn't.

Under the government's approach, Section 1346 might fairly be renamed "Money-Fraud Lite"—the same "theft" offense with only some of the necessary elements. If, as the government says, "[s]urely Congress did not enact Section 1346 merely to provide an

additional ground on which to prosecute cases that already could have been prosecuted as money-or-property frauds" (GB 23), then just as surely the government cannot complain if this Court finally puts a stop to prosecutions that abuse the statute in precisely that manner. Indeed, while the government now says that the contemplated-economic-harm requirement would essentially gut the statute (*id.* at 22-23), it opposed review in this case (as it has in many others) by contending precisely the opposite—that the approach followed by the majority of circuits produces only "slight" differences unworthy of this Court's attention. Opp. 14. The insincerity of the claim that the majority rule would "deprive Section 1346 of almost all practical effect" (GB 22) is also confirmed by the fact that the contemplated-economic-harm rule has been the law in large swaths of the country for years without the Solicitor General ever seeking its reversal in this Court.

In the end, the government does not even defend on its own terms the reasoning the Seventh Circuit used to affirm the convictions. Beyond its new, equally unpersuasive, grounds for reversing the majority rule, the government falls back on a contrived harmless-error argument and an invented forfeiture rule. The forfeiture argument—which would preclude review solely because a defendant had the temerity to *ask* the trial court to exercise its discretion contrary to the prosecutor's preference—is precluded by the existing rules and this Court's cases. It is also ironic that the government continues to press this invented forfeiture claim while at the same time insisting that *it* be relieved from this Court's actual rules with respect to the obstruction conviction. In any event, the harmlessness arguments are incredible. The government now expects this Court to be-

lieve that "any" rational juror would readily have found, beyond a reasonable doubt, that petitioners contemplated inflicting economic loss after *this* jury spectacularly rejected the great bulk of the "looting" allegations that the government *did* make.

ARGUMENT

I. CONTINUATION OF THE CONTEMPLATED-ECONOMIC-HARM REQUIREMENT IS COMPELLED BY SECTION 1346 AND THE CONSTITUTION.

The government's newest position is that the "text" of Section 1346 requires that the statute be construed identically in all its applications, in public or private settings, and that no textual basis supports the creation of a contemplated-economic-harm requirement. According to the government, the only relevant guidepost is Congress' desire to overturn *McNally* so as to outlaw all "material" breaches of a fiduciary duty of "loyalty." A contemplated-harm requirement, as the government sees it, would effectively reinstate *McNally*. Every aspect of this argument is wrong. While Congress surely meant to overturn the outcome in *McNally*, it did not clearly invite a vast expansion of federal jurisdiction over private conduct, and the Court can certainly give effect to Section 1346 without issuing the government the blank check it seeks.

1. The first sentence of the mail fraud statute reaches the use of the mails to execute "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses." The narrow issue in *McNally* was whether this "disjunctive" language should be "construed independently" so as to define two distinct punishable "schemes": [1] "to defraud" and [2] to "obtain[] money or property." *See McNally*, 483 U.S. at 358; *id.* at 364-65

(Stevens, J., dissenting). The Court rejected the disjunctive reading and held that the statute reached only those "schemes to defraud" that seek to deprive the victim of "money or property." *Id.* at 359-60.

This interpretation excluded from Section 1341 schemes like the public corruption at issue in *McNally*, where a state official awards a contract on the understanding that he will receive kickbacks. *Id.* at 360. Although those schemes obviously involve money (a bribe or kickback), the defendant does not scheme to obtain it from *the victim* of the deception, but rather from a party who is complicit instead of deceived. Section 1346 makes clear that this *additional* class of cases is now, once again, properly reachable through Section 1341. Under Section 1346, therefore, the intended corrupt gain and the contemplated loss need not be two sides of the same coin. *See, e.g., United States v. von Barta*, 635 F.2d 999, 1003-07 (2d Cir. 1980).

In making this change, however, Congress did not create a new non-fraud offense or even take the smaller step of redefining "fraud." It did not, for example, adopt a fully disjunctive reading of Section 1341 by defining a "scheme to defraud" to *mean* a deprivation of "honest services." Section 1346 instead says that a "scheme to defraud" now "*includes*"—in addition to the money and property frauds to which *McNally* had limited the phrase—a scheme to "deprive another of the intangible right of honest services." The language thus recaptures the corruption cases that had been ruled out by *McNally*; it does not swallow what was *already* included in Section 1341 through a theory that all schemes to steal from the victim reflect a lack of "honesty."

2. The government contends that "the scheme involved in *McNally* itself" marks the beginning and the end of divining Section 1346's contours. GB 11, 13, 16-17. That scheme, it says, provides a clear and workable definition of fraud under Section 1346—"a breach of the fiduciary duty of loyalty, carried out with an intent to deceive, on a material matter" (*id.* at 11-12)—and a contemplated-economic-harm requirement would impermissibly add an "extra-textual" "element" to this "*McNally*-based" list. *Id.* at 18-20.

McNally did not establish some "fiduciary duty of loyalty" as the "paradigm" of honest-services fraud prosecutions that Congress purportedly "reinstate[d] * * * in *both* public and private contexts." *Id.* at 13 (emphasis added). The scheme alleged in *McNally* was a deprivation of "the intangible right of the citizenry to good government" (483 U.S. at 356), not one to violate some highly abstract (and apparently federal) "duty of loyalty" that applies equally to public and private settings. This Court's opinion does not even *contain* the word "loyalty." Neither does Section 1346.

"*McNally* itself" did not in *any* respect address the meaning of *private*-sphere duties: The Court assumed that the defendants were "public fiduciar[ies]," 483 U.S. at 355-56 & 360, because the government had proceeded under (and did not challenge) the Sixth Circuit's rule that "misconduct of a fiduciary in the administration of exclusively private matters is not actionable * * * under an intangible rights theory." *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986). Indeed, if "*McNally* itself" were this Court's sole point of reference for interpreting Section 1346, the statute could be read as simply re-

turning the law to where the Sixth Circuit had left it in that case—and thus not to apply *at all* outside of public corruption prosecutions. *See also* 134 Cong. Rec. 33,297 (1988) (Rep. Conyers) (statute "overturn[s]" *McNally* and "[n]o other change in the law is intended").

In any event, the government concedes that specific intent is an essential element of any "scheme to defraud." The contemplated-harm requirement is part of the intent required to violate the mail-fraud statute in private cases. The precise contours of the specific intent requirement (in *any* setting) were not remotely at issue in *McNally;* they must be drawn from the pre-existing case law. Those cases—particularly *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983)—make clear that the contemplated-economic-harm requirement is an essential component of the required intent. In fact, virtually *every* conviction from the small group of private-sector honest-services mail and wire fraud prosecutions that predated *McNally* was supported by proof of contemplated or foreseeable economic harm, and a number of pre-*McNally* prosecutions were turned back precisely because such proof was lacking. *E.g. United States v. Ballard*, 663 F.2d 534, 541-42 (5th Cir. 1981); *Epstein v. United States*, 174 F.2d 754, 766-68 (6th Cir. 1949).

The government concedes that *Lemire* expressly required the government to prove that the defendant contemplated economic or business harm to the victim. It also concedes that a number of *other* courts required a showing that "some actual harm or injury" was "at least contemplated" without *explicitly* requiring it to be "economic." *Id.* at 30-31 (discussing *von Barta*, *supra*; *Ballard*, *supra*; and *United States*

v. Feldman, 711 F.2d 758 (7th Cir. 1983)). Nonetheless, it dismisses *Lemire* as an "outlier" and *von Barta*, *Feldman* and *Ballard* as cases that "naturally focused on economic harm" because they *just happened* to "involve[] fraudulent conduct in a commercial or financial setting." GB 30-31.

Thus, in a mere twenty years *Lemire* has evolved from a "thoughtful opinion" that the Solicitor General could readily commend to this Court as exemplifying the "uniformly held" view of the lower courts (Pet. Br. 31-32) to an errant ruling that Congress could not possibly "be deemed to have implicitly adopted." GB 31. And if *some* pre-*McNally* private-sector cases "naturally focused on economic harm" merely because of fortuity, then perhaps the Solicitor General could now muster some *other* pre-*McNally*, private-sector examples of convictions that were affirmed even though the defendant clearly did *not* contemplate any economic harm to his victim (to say nothing of evidence that anyone in Congress knew of such a case in 1988).[1] By the government's own tell-

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[1] The government claims that some pre-*McNally* private-sector cases, unlike *Lemire*, "indicated" that "the harm contemplated by honest-services schemes need not be economic." GB 32. None of the cases it cites affirmed a conviction in the absence of contemplated economic harm, and several in fact involved such harm. *E.g. United States v. Newman*, 664 F.2d 12, 20 (2d Cir. 1981) ("the indictment fairly informed appellee" that "part of the charge against which he must defend" was "proof of direct, tangible, economic loss to the victim, actual or contemplated"); *United States v. Castor*, 558 F.2d 379, 383 (7th Cir. 1977) (assuming *arguendo* contemplated-economic-harm requirement, because of potential "pecuniary loss"); *United States v. Venneri*, 736 F.2d 995, 996 & n.** (4th Cir. 1984) (no plain

[Footnote continued on next page]

ing, after all, Congress merely restored the government's power to prosecute private-sector "honest services" cases as it had *successfully* done before *McNally*.

The government warns, however, that a contemplated-*economic*-harm requirement would "curtail the coverage of Section 1346" beyond "commercial settings," because "fiduciary or employer-employee relationships also exist * * * for example, in medical, educational, charitable, or public-interest contexts." GB 25. But as should be obvious from well-known charities and university endowments, among others, non-profit organizations do not forswear any link to money solely because they are not primarily devoted to making it. And fiduciaries at non-profits who self-deal or take bribes or pilfer by deception cause no less risk of economic harm than their counterparts in the for-profit world. Prosecutors can therefore use the mail fraud statute to pursue them too. *E.g.*, *United States v. Aramony*, 88 F.3d 1369, 1373 (4th Cir. 1996) (mail fraud prosecution of United Way's CEO); *United States v. Jacobson* 4 F.3d 987 (4th Cir. 1993) (table) (fertility doctor who deceived patients); *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997) (plagiarism fraudulently deprived university of complicit professors' honest services).

If, on the other hand, there are species of dishonesty or disloyalty *without* any nexus to commerce

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[Footnote continued from previous page]

error because jury instructions referred to material nondisclosure "as well as the need to find that the defendant contemplated injury to" his employer).

that federal prosecutors have been improperly deterred from pursuing under the contemplated-economic-harm rule, the government does not say what they are. More importantly, it points to no pre-*McNally* case involving *this* theory of honest-services fraud that Congress "likely" intended to reach when it reacted to *McNally*. GB 25. Before this Court endorses a wholesale expansion of the mail fraud statute to punish harm lacking *any* economic nexus that arises in, for example, doctor-patient, priest-parishioner, or teacher-student relationships, there should be a strong indication that Congress intended, contemplated or at least reasonably foresaw such an outcome.[2]

3. Far from relieving the government of the duty to prove that the defendant contemplated economic harm, the legislative sponsors of Section 1346 were keenly aware of this important proof requirement in honest-services-fraud prosecutions and cited *Lemire*, *Feldman*, and *Ballard* as the key to "foreclos[ing] the abuse of the statute to prosecute trivial, noncriminal matters." 134 Cong. Rec. S15999-01 (1988) (Sen. Biden).

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[2] The government's only example—a psychologist who received kickbacks for referring patients to a hospital—comes from a case decided after *McNally*. The court reversed because the government could prove *neither* intent to defraud *nor* materiality. *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996). The doctor's conviction under a different federal statute that independently outlawed the kickbacks was affirmed. The government's complaint, then, is that it was foiled in its attempt to pile on additional felonies based on state-licensing-board ethical rules. *Id.* at 442 n.3.

The government dismisses these parts of the legislative record because it views the pre-*McNally* law, except where it helps prosecutors, as a dog's breakfast of cases that "had announced conflicting rules and in some contexts had failed to clarify the scope of the doctrine." GB 29, n.11. The government prefers its own self-serving *ipse dixit* about "paradigm cases of deceptive breaches" (*id.* at 30 n.11), where the "paradigm" can be discerned only by prosecutors operating at improbably high levels of generality. Indeed, the government purports to "confirm[]" *its* view of Congress's purpose by quoting Senator Biden's description of an honest-services-fraud bill that failed to pass, while rejecting a second statement from him about the bill that did pass as something "Congress could not have intended." GB 29 n.11.

As the record stands, at least four circuit court decisions concededly had adopted a contemplation-of-harm requirement before 1988, and a key sponsor of what became Section 1346 affirmatively embraced them. *Lemire*, the last and most thorough of those decisions, also concededly had surveyed those cases and clearly had held that the contemplated harm must be *economic*. And shortly before Congress enacted Section 1346 the Justice Department itself told this Court that *Lemire* was a "thoughtful opinion." On this record, any notion that Congress "restored" the bulk of pre-*McNally* law but somehow intended to *exclude* Lemire is improbable in the extreme. But if there were any ambiguity on this point it would have to favor petitioners, because such ambiguities must be interpreted "in favor of defendants, not prosecutors." *United States v. Santos*, 128 S. Ct. 2020, 2028 (2008) (plurality opinion of Scalia, Souter, Ginsburg and Thomas, JJ.).

4. The government nonetheless says that Congress relied solely on the "materiality" requirement to "embod[y] a related concept to contemplated harm." GB 34. Materiality assuredly is an essential element of all mail fraud prosecutions, but the government does not adequately explain why this (nontextual) element somehow forecloses inquiry into specific intent, including whether the defendant subjectively contemplated economic harm.

Moreover, the notion that Congress relied solely or even primarily on materiality to assure a properly limited scope for Section 1346 is implausible. A decade *after* Section 1346 became law the government argued to this Court that Congress never even *intended* to make materiality an element of mail or wire fraud, and that lower court cases either did "not hold that materiality is required," or were "ambiguous at best." Respondent's Brief, *Neder*, at 34, 42. The fact that the government lost *Neder* does not help its current argument. In holding that materiality *is* an element of mail fraud, the Court resolved a circuit split that had long "persisted and show[ed] no signs of abating." Respondent's Certiorari Brief, *Neder*, at 6, 8 (Sept. 1998). Needless to say, Congress could not be deemed to have clearly and unambiguously chosen materiality as an element that replaces proof of contemplated-economic-harm unless materiality clearly *was* an element of mail fraud.

The government's materiality-only approach would dramatically change the DNA of the mail fraud statute, turning large categories of conduct from specific-intent to general-intent offenses. The jury in this case, for example, was instructed to find an "intent to defraud" if petitioners intended "to deceive" Hollinger "in order to * * * deprive the corpo-

ration and its shareholders of their right to the honest services of their corporate officers." J.A. 338a. "Honest services" meant the "fiduciary duty of loyalty" they owed to Hollinger "under Delaware law." J.A. 336a. Because that state-law duty has a disclosure component (J.A. 336-37a), a finding that petitioners deprived Hollinger of honest services also satisfied the need to prove "deception." Hence, if the breach was "intentional"—*i.e.*, petitioners "knew" they had failed to disclose a recharacterization of the management fees—the government's burden was met.[3]

Thus, as Professor Coffee has noted, "[i]n private fiduciary cases" it is essential that "'actual harm' to the principal or fiduciary should have been intended (or at least reasonably foreseeable)" so that "civil law prophylactic rules are not automatically converted into a federal felony." John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427, 460-61 (1998). Conversely, "[i]f the mens rea for honest services fraud does not include a foresight of harm but is characterized rather as merely the intention to commit the breach of fiduciary duty, it hardly constrains the offense at all." Andrew B. Matheson, *A Critique of United States v. Rybicki*, 28 Am. J. Trial Advoc. 355 (2004); *see also* Geraldine Szott Moohr, *Mail*

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[3] And if this meager level of intent is too onerous for the government in a particular case, the jury can always "infer" that the defendant "intend[ed] the natural and probable results of [his] actions." GB 24. Or, as here, it could find that he "knew" what he avoided knowing. Tr 15187-88 (willful blindness jury instruction).

Fraud Meets Criminal Theory, 67 U. Cin. L. Rev. 1, 44-45 (1998).

The government's conflation of specific intent and fiduciary duty distinguishes its position here from the misappropriation theory the Court approved in *United States v. O'Hagan*, 521 U.S. 642 (1997). GB 35. *O'Hagan* held that a fiduciary's "undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information"—a thing of value that itself "qualifies as property." 521 U.S. at 653-54. Here, by contrast, it sufficed to show that petitioners, "in breach of a duty of loyalty" to Hollinger, knowingly failed to act in conformity with that *same* duty.

O'Hagan itself "emphasize[d]" it was "[v]ital" to the Court's decision upholding "criminal liability" in that case that the defendant enjoyed the "sturdy safeguard" of strict specific-intent requirements. *Id.* at 665. That same safeguard is precisely what the government would now deny criminal defendants. Yet nowhere is this protection more vital than in a prosecution where the only barrier between the prosecutor and convictions on counts punishable by 20 years' imprisonment (and predicates under RICO) was proof that (1) petitioners' non-disclosure was "capable" of "influencing" a "decision" by a "decision-making body" (*i.e.*, Hollinger or its shareholders) (J.A. 338a), and (2) it "could reasonably have been foreseen" that *someone* would make relevant use of the U.S. mails or a private mail delivery service (J.A. 339a-340a).

5. The government asserts that the contemplated-economic-harm requirement cannot be the

law in private-sphere cases, because such a rule makes no sense in public corruption cases and the two contexts must be treated identically. GB 19-20. This, too, is a surprising contention because the Solicitor General has repeatedly opposed review on the ground that the contexts *are* different. *E.g.*, Brief in Opposition, *Mattison v. United States*, No. 99-141 (Sept. 1999) at 14-15; Brief in Opposition, *Rise v. United States*, No. 03-1088 (Apr. 2004) at 13 n.3. This objection is also trivial, because the government itself contends that the key phrase in Section 1346 is a "term of art" that must take its meaning from the pre-*McNally* "doctrine" that Congress intended to restore. GB 29. Because honest-services fraud has always been understood to mean something quite different in the public and private settings, there can be no "textual anomaly" (*id.* at 19) in recognizing that Congress' supposed "term of art" is context-sensitive.[4]

Moreover, even when the Court construes the unvarnished text of a statute, it routinely applies canons of construction that are themselves context-sensitive, such as clear-statement rules and the rule of lenity. Here, for example, as Professor Coffee has noted, there is a "critical distinction" between the public and private contexts: while the legislative record "may well constitute a clear statement that public officials are to remain subject to federal anticorruption legislation, relatively little is said about the

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[4] As the amicus brief supporting the government explains: "Courts developed the 'reasonably foreseeable harm' test to address unique features of the private sector employer-employee relationship." CREW Br. 6-9.

private fiduciary context." Coffee, *supra*, at 455-56. In particular, "no intent to override state corporate law is expressed anywhere in that legislative history" even though this Court has "presumptively allocated corporate governance to the states." *Id.*[5]

Those differences in the clarity of the legislative record, and the significant disparity in the pre-*McNally* development of public- and private-sector caselaw, also are obviously crucial to the rule of lenity and to due process concerns that uniquely require a narrower construction of the doctrine in the private sphere. The government's approach—arguing that material disloyalty by fiduciaries is unlawful, details to follow—not only fails to give notice of what is criminal but also creates an intolerable danger of discriminatory enforcement by permitting prosecutors to fill in those "details" as needed to fit a previously selected quarry. Rudimentary principles of due process prohibit a law that vests federal prosecutors with such unbridled discretion.

In the end, it is not clear that the government is even willing to commit itself to a readily identifiable source for the "duty of loyalty" it now advocates. After trying this case on the basis that the duty petitioners allegedly breached derives from Delaware corporate law, the government now eschews any defense of that theory, relying instead on a seemingly

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[5] The fact that Congress relied on different sources of constitutional authority for private- and public-sphere cases similarly requires that courts be attentive to the *applicable* source of authority. *See* Pet. Br. 39-41 & n.12. The government does not refute the unique Commerce Clause hazards that its theory poses for intrastate conduct such as that in Count 7. *Id.*

federal duty derived from *McNally* itself and some as-yet-undetermined federal common law of fiduciary obligations. Indeed, in *Weyhrauch* the government goes so far as to affirmatively disclaim the state-law basis that it employed *here*, contending that "[m]aking state law an ingredient of mail fraud would fragment federal criminal law in a way harmful to federal policy interests" and would infringe state sovereignty by "attach[ing] to a set of state-law duties federal consequences that the States did not contemplate and may not desire." WB 43-44.

The government thus continues its uninterrupted 20-year spree of honest-services opportunism, in which prosecutors argue seemingly anything to secure convictions, including repudiation of the very position the Solicitor General now takes. Just a fortnight ago, the Third Circuit rejected the *government's* argument that "the breach of a fiduciary duty is not a necessary element of 1346." GB in *United States v. McGeehan*, No. 05-1954 at 37 (citation omitted); opinion reported at 2009 WL 3380678 (3d Cir. Oct. 22, 2009). The government assured *that* court that "a variety of tests" *other than* requiring proof of a fiduciary duty have "limit[ed] the scope of § 1346," including the foreseeable-economic-harm requirement (not yet adopted in that circuit). *Id.* at 39. And even under a fiduciary-duty requirement, the government leaves open the possibility that virtually *any* agent-principal relationship will do. WB 27 n.10 (deriving fiduciary obligations from a "'universal' rule for principals and agents, both public and private" (citations omitted)); *see also United States v. Middlemiss*, 217 F.3d 112, 120 (2d Cir. 2000) (noting that Section 1346 "does not require an actual fiduciary relationship" to convict one who "violated his

employer's rules regarding conflicts of interest and financial disclosures").

Thus, the only thing clear is that unless this Court stakes out unambiguous limits on the reach of such a malleable statute, including retention of the contemplated-economic-harm requirement, prosecutors will simply continue to make it up as they go along.

II. THE FAILURE TO INSTRUCT ON THE NEED TO FIND CONTEMPLATED ECONOMIC HARM SERIOUSLY PREJUDICED PETITIONERS

The error here was far from harmless. Neither side developed or had *reason* to develop a trial record bearing on either theory of contemplated-economic-harm that the government now proffers; the government successfully insisted such evidence was completely irrelevant. Pet. App. 207a-08a. Even so, the government's arguments are flatly contradicted by the record, which shows that petitioners sought and followed legal advice on whether to disclose non-compete payments and, in any event, disclosed their receipt both as management fees (as they were originally approved) and non-compete payments (as they had been recharacterized). There was no economic harm for petitioners to contemplate or foresee.

1. As a preliminary matter, the government's requested remand should be denied, because the Seventh Circuit already "*did* conduct harmless analysis." GB 40 (emphasis added). The government's principal ground for seeking a do-over is to allow that court to apply this Court's recent decision clarifying that "submission of an erroneous, alternative legal theory to the jury could be harmless error" under *Neder*. *Id.* (citing *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (per curiam)). But as the government

no doubt recognized at the certiorari stage, where it opposed review outright rather than suggesting remand, the Seventh Circuit already conducted harmless-error review on the strength of the government's *unopposed* claim that *Neder* provides the proper framework. Pet. App. 10a; Govt. C.A. Br. 59 n.10. The only *relevant* new development is the government's shift on how the error might be harmless, but that is reason to refuse considering these new arguments altogether, not to grant another bite at the apple below.[6]

2. The government now recognizes it cannot rest harmlessness on supposed proof of money-fraud, presumably because the lack of a unanimity-of-theory requirement for the fraud counts means it has the insurmountable burden of showing that *not one* juror convicted for honest-services fraud alone. Pet. Br. 55-56; Pet. 31. Likewise, the government knows it is fact—not argument (GB 4 n.1)—that the agreements at issue barred Hollinger's officers from competing post-termination with "any Publication" owned by APC or "any of its affiliates" (Pet. App. 159a)—a hundred or more publications at the time (Pet. Br. 9 n.4). A government witness's mistaken testimony about a document's wording cannot change the operative language that Kipnis drafted to legally bind the other two petitioners.

Additionally, the fact that the $5.5 million had previously been approved as management fees is not

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[6] Moreover, by taking this case for review, the Court *already* necessarily rejected the government's harmless-error gambit. *See United States v. Williams*, 504 U.S. 36, 40 (1992).

something that "some defendants at times suggested" (GB 4); the star witness consistently testified as such. The government's primary harmlessness argument in the court of appeals (*i.e.*, honest-services fraud was simply "dishonest" theft of money (Pet. App. 10a)) was doomed if petitioners and Radler were simply "mistaken" in believing the money was theirs. GB 4. Therefore, the government needed to peddle to the Seventh Circuit a "theory" that Radler had perjured himself: that despite Radler's testimony, "[petitioners] and Radler *knew* this money belonged to [Hollinger] and that they were stealing it disguised as non-compete payments." Govt. C.A. Br. 36 (emphasis added).

But the government's recently unsealed district court filing shows it did not think Radler a liar on this point.[7] Thus, it is no longer possible for the government to press the claim that petitioners dishonestly characterized *stolen* money. Rather, it must show that any rational juror convicting on the honest-services theory would have found that "the undisclosed recharacterization of management fees as non-competition payments *itself* exposed Hollinger to

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[7] The filing (*see* GB 5 n.2) instead shows that the government "ultimately determined that the information provided by Radler was accurate and complete," (Govt. Radler Sentencing Submission 5 (refiled Oct. 23, 2009)), meaning he repudiated the government's theory that he and the others intended to steal Hollinger's money. Indeed, the AUSAs even proclaimed (under seal) that Radler's testimony on counts 1 and 6 was one of "defendants' strongest arguments concerning Radler," because it was "inconsistent with the government's theory of the case." *Id.* at 16.

foreseeable economic harm." GB 42 (emphasis added).

3. Because the government won a ruling that it need not prove "foreseeable harm" (Pet. App. 208a), and since its constant refrain—until reaching this Court—was that honest-services fraud was just theft-without-the-hassle-of-proving-theft, not surprisingly the trial record falls well short of "overwhelming" proof that establishes "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 16, 19.

The government's first post-trial theory posits a requisite harm three steps removed from the scheme: [1] petitioners "risk[ed] undermining public confidence in the integrity and competence" of management by "self-dealing" to obtain their lawful foreign-tax reduction, [2] such risks can "injur[e] the company's reputation," and [3] "reputational injury can have economic repercussions by affecting the willingness of others to do business with, work for, or invest in the company." GB 42-43. *No* juror was compelled to proceed past step one, because it is not "self-dealing" when previously approved payments are reclassified to benefit the employer by creating binding non-compete covenants. Moreover, nowhere did the government show that "others" would lose confidence in a corporation whose officers did so while lowering their personal taxes in full compliance with the tax laws.

Second, the government asserts "significant litigation risk" because "Hollinger did not disclose the payments in its SEC filings until April 2002" when it "falsely" described them. GB 43. But these allegedly false disclosures came a year *after* the scheme alleged in the counts 1, 6 and 7 ended. Pet. App. 35a

(scheme lasted until "at least in or about May 2001"). The jury *acquitted* petitioners of a different scheme that *did* include the 2002 filings. Pet. App. 60a (count 8), 75a, 78a (count 9). Moreover, there was no realistic risk of litigation because in March 2001 petitioners had already disclosed the *full* management fee approved for Ravelston *and* Ravelston's affiliation with petitioners. Govt Filing Exh. 9E(1) at 19-20 (2001 Proxy disclosing all management fees approved for 2000); J.A. 393a (same in 2002 10-K). And outside counsel had initially advised there was no obligation to disclose any non-compete payments. J.A. 79a-81a, 414a, 417a-22a.

Finally, the only way error on Count 7 could be harmless is if a juror acquitting outright on 90% of the alleged fraud (because unpersuaded by the key prosecution witnesses), and then convicting on the next 9% only after finding something *other than* an intent to defraud, nonetheless would have been "overwhelmed" by the same theft theory, based on the same type of testimony, from some of the very same witnesses, on the last 1%. That is highly unlikely. What distinguished Count 7 from the acquitted counts was Kipnis's oversight in not drawing up the approved non-compete agreements. Pet. Br. 10-11. As is clear from the court's entry of judgment of acquittal on count 7 as to *him*, that oversight was simply incongruent with intent to defraud. Nothing shows that Black or Boultbee contemplated economic harm to Hollinger either; their payments were duly authorized, as evidenced by a different director's approval and the board's unanimous vote to confirm and ratify it. J.A. 362a, 364a, 367a-68a, 380a-87a. A rational, *properly* instructed juror again would have been far from overwhelmed on the critical intent element.

4. The instructional error prejudiced petitioners on *all* counts, including obstruction. The government *now* disagrees, citing "overwhelming proof of Black's motive to undermine an inquiry into his mischaracterized payments, regardless whether that mischaracterization constitutes fraud." GB 45. But the government waived its intent-focused argument by not joining the issue when raised at the certiorari stage. The central point we argued then was that a jury assessing Black's state of mind—obstruction requires a *corrupt* intent—would have been far from "overwhelmed" if it knew that Black was really *innocent* of *every* "offense" under investigation.

This was all set forth in the petition. Once the voluminous prejudicial evidence spilling over from weeks of efforts to prove several other fraud, tax and RICO counts is wiped away, and after a jury, properly instructed, concludes that Black really committed *no* offense at all, nothing (certainly nothing overwhelming) remains to document an intent to "subvert or undermine" (J.A. 342a-343a) the government's misguided investigation. Pet. 11-12 n.7. The government is left with a man who helped his assistant move materials from a Toronto office to a Toronto residence mere days ahead of his eviction.

Rule 15.2 requires the respondent to point out "any perceived misstatement" of fact or law in the petition that "bears on what issues properly would be before the Court if certiorari were granted." The petition squarely raised the scope of *relief* available if the Court rules for petitioners on the questions presented: reversal of both the fraud and the obstruction convictions. And the government argued harmless error in opposing certiorari, plainly recognizing that the level of prejudice resulting from the error—

measured through consideration of the evidence, the jury instructions and the remainder of the trial record—was within the scope of the questions presented. The government cannot now artificially limit that prejudice inquiry to the counts it chooses. Because the government failed to abide by its "obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement" in the petition, its belated arguments for affirming the obstruction conviction must be "deemed waived." Sup. Ct. R. 15.2; *see also Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009).

Even belatedly, the government points to nothing "overwhelming" for its position, much less any *permissible* proof of "motive." It never denies that Black lacked *all* knowledge that the SEC was about to issue a *sixth* document on the eve of his eviction or that he had already let his lawyers copy *every* document in his office. JA 202a-03a. Nor is there proof that the boxes of personal effects and papers contained a single pertinent, unproduced document or that Black even knew what his secretary chose to pack up. The case was so tenuous on corrupt intent to impede a *U.S.* proceeding that the government instead repeatedly injected references to an irrelevant Canadian document preservation order (*e.g.* Tr 882, 14998-99), which Black was not accused, much less convicted, of violating.

The only thing "overwhelming" is the government's quest to salvage something—anything—from its disastrous prosecution. Because turning state-law duties into federal crimes apparently was not ambitious enough, the government manufactured an obstruction charge based entirely on conduct in a *foreign* country. The government desperately seeks to

keep Black in federal prison a few more years based on the movement of personal belongings taking place wholly in downtown Toronto, even though Black was unaware of the SEC document request that he supposedly evaded. The Court should also reject *that* absurd consequence of the lower court's willingness to let federal prosecutors make up the meaning of honest-services fraud as they go along.

III. The Lower Court Erred In Imposing An Extra-Textual Appellate Sanction For Declining The Government's Suggested Form Of Verdict

The government's brief extols the occasional "virtue of special verdicts," while acknowledging they are historically "viewed with disfavor." GB 47. The district judge no doubt would have considered these points had the government not *withdrawn* its suggestion for special verdicts. The government also presses *policy* arguments for curtailing a defendant's appellate rights if he opposes special verdicts. *Id.* at 48. No doubt, the Criminal Rules Committee would consider *those* arguments too if the government ever proposes a Rules amendment. But what the government proposed in this case deserves *no* consideration: a post hoc, non-textual sanction imposed, without notice, for suggesting *post*-verdict interrogatories rather than acquiescing in the government's suggestion to use "disfavored" *pre*-verdict interrogatories.

Nobody denies that courts occasionally employ special verdicts in criminal cases (especially where defendants agree to them), despite the lack of any textual authority in the rules. The Court might one day choose to review whether *that* is appropriate. The issue here, however, is whether federal rules permit *sanctions* when a defendant declines the gov-

ernment's suggestion to forgo a general verdict. The written rules plainly forbid this. *See* Fed. R. Crim. P. 57(b) ("No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.").

There are at least two compelling reasons the Court should not use this case to depart from the normal process for creating punitive rules. First, the government's proposed sanction has no place in a case where the parties merely disagreed on *when*—not *whether*—special interrogatories should be used. Until this case, no court penalized a defendant for disagreeing about the *timing* of special interrogatories.

Petitioners' proposed *post*-verdict interrogatories would have just as effectively revealed whether any juror relied on the government's unlawful honest-services-fraud theory—*without* imposing heavy burdens on petitioners' jury-trial rights.[8] If there is any risk that special interrogatories would improperly encourage jurors to revisit their verdict (and the government argues there is not (GB 50)), *post*-verdict forms provide the only assurance that the jury's decision *is* final *before* it records its reasoning.

The agreement to *post*-verdict interrogatories also readily distinguishes petitioners from defendants who complain on appeal about errors (such as

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[8] Interrogatories posed *after* the verdict is returned are incapable of improperly influencing that verdict.

improper summation) that curative or limiting instructions might have mitigated. GB 47-48. The government cites no case holding that a defendant forfeits his right to such an appeal merely because he and the government disagreed over *when* a curative instruction should be given.[9]

The second reason to bar the government's bypass of the rulemaking process is that its ad-hoc sanction is deeply at odds with the most basic principles of fair notice. The Seventh Circuit is among the many courts that have long disfavored special verdicts, and petitioners cited and relied on authority to that effect. J.A. 430a-32a. There was no reason for petitioners to believe the rule had changed. Indeed, shortly before their trial, in another high-profile prosecution charging both types of mail fraud, obstruction and RICO, the same Office argued that the trial judge properly rejected the *defendant's* request for a special verdict to ensure juror unanimity, because such verdicts lack express authorization in "the Criminal Rules," are "'disfavored' in this Circuit," and are "never required in criminal cases." *United States v. Warner*, No. 02-506 (N.D. Ill.), D.E.

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[9] Moreover, nothing in our jurisprudence "generally disfavors" the practice of a judge using curative or limiting instructions to mitigate prejudice. Indeed, limiting instructions (unlike special verdicts) are expressly *authorized*. Fed. R. Evid. 105. And when a defendant turns down such an instruction it simply means that the court will consider the forgone benefit as *one* factor in assessing prejudice. *E.g.*, *United States v. Wheeler*, 540 F.3d 683, 693 (7th Cir. 2008). Under the Seventh Circuit's ruling, though, petitioners "forfeited their objection to the [jury] instruction" altogether. Pet. App. 11a.

832 at 72; opinion reported at 2006 WL 2583722 *34 (Sept. 7, 2006).

Our system of justice demands at least a modicum of notice before a defendant can be stripped of his right to prove that he sits in prison for conduct that is *not* a crime.[10] In denying petitioners that right, the lower court cited a "rule" that it first announced *after* petitioners supposedly violated it. Regardless whether that rule has any merit, it cannot properly be applied to them.

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[10] The government says petitioners "did not forfeit their claim that the jury instructions were erroneous." GB 52. Rather, petitioners were barred from relying on the rule (established in *Yates*) that such instructional error "requires reversal." *Id.* In other words, petitioners could still "claim" they were wrongly convicted, they just could not ask a court to do anything about it.

CONCLUSION

The Court should reverse the judgment of the court of appeals with instructions to vacate petitioners' convictions on all counts.

Respectfully submitted.

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500

MICHAEL E. SWARTZ
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000
Counsel for Petitioner Kipnis

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100
Counsel for Petitioner Black

November 2, 2009

AMICUS CURIAE BRIEF

(7)

No. 08-876

Supreme Court, U.S.
FILED
AUG 6 - 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

LAWRENCE S. ROBBINS*
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

TC+TA 065 4KIV80

QUESTION PRESENTED

This brief addresses the following, which is an antecedent question to the first question presented in the petition, see, *e.g. United States* v. *Grubbs*, 547 U.S. 90, 94 & n.1 (2006):

> Whether 18 U.S.C. § 1346 is unconstitutionally vague.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation and represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

This is such a case. Since its enactment in 1988, the "honest services" statute, 18 U.S.C. § 1346, although unintelligible, has been used to target "a staggeringly broad swath of behavior," *Sorich* v. *United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). The existence of the statute, and the unpredictability of prosecutions based on it, impose an unwarranted burden on American companies and executives, who are entitled to fair notice of what conduct is and is not prohibited. Accordingly, the Chamber and its members have a strong interest in this Court's invalidating section 1346, or at least cabining its otherwise "standardless

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel has made a monetary contribution to this brief's preparation or submission.

sweep," *United States* v. *Rybicki*, 354 F.3d 124, 161 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting).

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioners are former executives of the newspaper company Hollinger International, Inc. They were accused of looting Hollinger through, among other things, payments made under non-competition agreements that the government claimed petitioners had not properly disclosed. Following a four-month trial, the jury acquitted on most charges, rejecting the principal prosecution theory that petitioners stole from the company by diverting Hollinger's money to themselves. Instead, the jury convicted on three charges of mail fraud, for which the instructions permitted conviction on the theory that petitioners deprived the company or its shareholders of the "intangible right of honest services." These instructions did not require a finding – and there is no reason to believe that the jury found – that petitioners threatened or caused any economic harm to the company.

The basis for the "honest services" charge is 18 U.S.C. § 1346. Section 1346 was enacted in 1988 in response to *McNally* v. *United States*, 483 U.S. 350 (1987), which held that the mail-fraud statute, 18 U.S.C. § 1341, was "limited in scope to the protection of property rights," and said that "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.* at 360. Congress spoke, but not clearly. Section 1346 provides in its entirety: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

In an effort to impose reasonable limits on the scope of an otherwise sweeping and amorphous statute, petitioners explain why section 1346 does not apply to a private individual whose alleged scheme did not contemplate economic harm to its target. The Chamber agrees with petitioners on this point but submits that there is "an issue 'antecedent to . . . and ultimately dispositive of'" the question presented, *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) – namely, whether section 1346 is unconstitutionally vague. For if the statute is not sufficiently intelligible to pass constitutional muster, "[i]t makes little sense to address" what elements constitute a violation of it. *United States* v. *Grubbs*, 547 U.S. 90, 94 n.1 (2006). Accordingly, the Court should address whether 18 U.S.C. § 1346 is a constitutional enactment. Cf. *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 540-541 (1999) (*amicus* brief of Chamber was one basis for deciding issue not addressed by parties but "easily subsumed within the question on which we granted certiorari").

We submit that Section 1346 fails both prongs of the void-for-vagueness inquiry. First, its unintelligible language fails to give ordinary citizens fair notice of what is prohibited. The courts of appeals have struggled to give shape, limits, and meaning to the phrase "intangible right of honest service," but their efforts ultimately amount to forbidden judicial definition of federal crimes. Second, the statute's capacious language invites arbitrary and unpredictable enforcement. As real-life examples show, the statute is a catch-all that can be used to target almost any imaginable form of dishonesty in government or

(of particularly grave concern to the Chamber) business.

The prospect of prosecution under section 1346, moreover, deters legitimate business dealings. These burdens are magnified by the federal Racketeer Influenced and Corrupt Organizations Act (RICO), which converts supposed deprivations of "honest services" into predicates for severe criminal penalties as well as for treble-damages liability in civil suits. The costs and burdens associated with potentially erratic prosecutions under section 1346, as well as with the defense of civil and criminal RICO suits predicated on honest-services fraud, are inevitable byproducts of an unconstitutionally vague statute.

ARGUMENT

I. Section 1346 Is Unconstitutionally Vague

The Fifth Amendment guarantee of due process forbids enforcement of a statute that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 128 S. Ct. 1830, 1845 (2008) (citing *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000), and *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)); accord *City of Chicago* v. *Morales*, 527 U.S. 41, 56, 64-66 (1999). Section 1346 is just such a statute. It "imposes insufficient constraint on prosecutors, gives insufficient guidance to judges, and affords insufficient notice to defendants." *United States* v. *Rybicki*, 354 F.3d 124, 157 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting).

A. Section 1346 Does Not Give Fair Notice of What It Prohibits

It is a basic tenet of due process that "'fair warning should be given to the world in language *that the common world will understand*, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible *the line should be clear*.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (emphasis added)); cf. *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2627 (2008) ("[E]ven Justice Holmes's 'bad man'" should be able to "look ahead with some ability to know what the stakes are in choosing one course of action or another."). If two decades of experience have taught us anything about 18 U.S.C. § 1346, it is that its language is incomprehensible, and it fails to draw any line at all, much less a clear one.

The text of the statute is opaque to an almost bizarre degree. The terms "intangible right" and "honest services" are individually indeterminate and in combination incoherent. What kind of services are we talking about? (Could an insincere sermon at Sunday religious services come within the statute?) Rendered by whom to whom? How much candor separates honest services from dishonest ones? And what does "intangible" contribute? The phrase "intangible right of honest services," moreover, is not defined in any legal code or dictionary, had no settled meaning when Congress enacted the statute, and has acquired no settled meaning since.

Small wonder, then, that the courts of appeals have by and large all acknowledged (with varying degrees of "frustrati[on]," *United States* v. *Urciuoli*,

513 F.3d 290, 300 (1st Cir. 2008)) that the text of section 1346 is "amorphous and open-ended," *United States* v. *Sorich*, 523 F.3d 702, 707 (7th Cir. 2008); accord, *e.g.*, *United States* v. *Brown*, 459 F.3d 509, 520 (5th Cir. 2006) (describing § 1346 as a "facially vague criminal statute"); *United States* v. *Weyhrauch*, 548 F.3d 1237, 1243 (9th Cir. 2008), cert. granted, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-1196). In fact, one of the few points they all seem to agree on is that the statute must mean something other than what it says.

In 2003, the en banc Second Circuit upheld the facial constitutionality of the statute by only two votes. Speaking for the four dissenters, Judge Jacobs commented that his court's troubled history with section 1346 was "telling evidence that most lawyers and judges, not to speak of ordinary laymen or prospective defendants, cannot be expected to understand the statute." *Rybicki*, 354 F.3d at 158; see also *Brown*, 459 F.3d at 534 (DeMoss, J., concurring and dissenting) (agreeing with the *Rybicki* dissenters based on "[y]ears of review of the application of § 1346 to varied facts").

Faced with unacceptably opaque language, the circuits have felt compelled "to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge." *Rybicki*, 354 F.3d at 163 (Jacobs, J.). But that well-intentioned effort has been a failure. See, *e.g.*, *Sorich* v. *United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). To take perhaps the most heroic example, the en banc Second Circuit redrafted section 1346 so that "in the private sector context" it criminalizes:

> a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.

Rybicki, 354 F.3d at 146-147. Even assuming that notice problems are reduced rather than enhanced through the use of a gloss specific to the private sector, it is not at all clear that the statute written by the Second Circuit – which criminalizes a fraud scheme by anyone owing fiduciary-style duties – captures anything that the ordinary mail and wire fraud statutes (which are not limited to fiduciaries) do not. And if the former is indeed swallowed by the latter, it is even less clear why section 1346 is needed at all.

In any event, any "rescue operation" rests on a flawed premise regarding the proper role of the federal courts. "Judicial invention cannot save a statute from unconstitutional vagueness; courts should not try to fill out a statute that makes it an offense to 'intentionally cause harm to another,' or to 'stray from the straight and narrow,' or to fail to render 'honest services.'" *Rybicki*, 354 F.3d at 164 (Jacobs, J.). It is axiomatic that "[l]egislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348; accord *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001). The

circuits' tortured attempts to cabin section 1346 demonstrate that the statute "imposes upon courts a role they cannot perform. . . . [T]he process takes decades and the work is performed by unelected officials without the requisite skills or expertise." *Rybicki*, 354 F.3d at 164 (Jacobs, J.); see also *Brown*, 459 F.3d at 534 (DeMoss, J.) ("Rather than address the larger constitutional problem with this statute, . . . [o]ur Court and our sister circuits end up doing precisely what most would say we lack the constitutional power to do, that is, define what constitutes criminal conduct on an ex post facto and ad hoc basis.").

B. Section 1346 Invites Unpredictable, Arbitrary, and Discriminatory Enforcement

Section 1346 is also unconstitutionally vague for the separate but related reason that it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). The statute's capacious language gives prosecutors nearly unbounded discretion, authorizing them to convert almost any imaginable ethical lapse into a federal criminal case. As Justice Scalia recently observed:

> Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.

Sorich, 129 S. Ct. at 1310.

The statute's "standardless sweep," *Rybicki*, 354 F.3d at 161 (Jacobs, J.), is illustrated by the prosecutions and convictions in such cases as:

- *United States* v. *Thompson*, 484 F.3d 877 (7th Cir. 2007). A state procurement official departed from the rules governing an elaborate process for awarding a contract to a travel agency. There were no kickbacks or bribes. "The prosecution's theory was that any politically motivated departure from state administrative rules is a federal crime, when either the mails or federal funds are involved." *Id.* at 878. The court of appeals reversed the conviction immediately after hearing oral argument, *see id.* at 877-878, and Judge Easterbrook commented that this prosecution "may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch." *Id.* at 884.

- *United States* v. *Brown*, 459 F.3d 509 (5th Cir. 2006). Officials at an investment bank who approved a transaction with now-defunct Enron that was alleged to be in substance a loan but that Enron accounted for as a sale were convicted of conspiring to deprive Enron of *its* employees' honest services. *Id.* at 514-516. The government's use of the honest-services theory prompted the court of appeals (which reversed the convictions) to comment on "the danger we face of defining an ever-

expanding and ever-evolving federal common-law crime." *Id.* at 522 n.13.

- *United States* v. *Gray*, 96 F.3d 769 (5th Cir. 1996). Basketball coaches at Baylor College who helped students cheat on academic course-work in order to establish eligibility to play basketball at the college were convicted of "defraud[ing] Baylor of their honest services," *id.* at 777.

As these examples suggest, section 1346 is malleable enough to reach nearly "any self-dealing by a corporate officer," *Sorich*, 129 S. Ct. at 1309 (Scalia, J.) or "any private employee who has an undisclosed conflict of interest or who otherwise breached their duties to their employers (as defined by those employers)," Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes As Case Study*, 96 J. CRIM. L. & CRIMINOL. 643, 662 (2006). Section 1346 thus co-opts a multitude of state-law provisions regulating business and non-profit organizations and transforms them into federal criminal prohibitions.

Relatedly, section 1346 typically muddies the waters for jurors facing the already daunting task of applying intricate legal instructions to complex evidence of white-collar misdealings. And this confusion is often entirely gratuitous given the existence of other, clearer federal anti-fraud provisions. Examples of cases in which section 1346 served no apparent purpose include:

- *United States* v. *Williams*, 441 F.3d 716, 724 (9th Cir. 2006). A financial advisor and estate planner used his elderly client's trust and power of attorney (along with the mails and

wires) to steal hundreds of thousands of dollars from the client. *Id.* at 724. This was prosecuted as theft of the client's "honest services," *id.* at 720, but it is also straight-up – indeed, classic – mail and wire fraud involving tangible property rights. See, *e.g.*, *SEC* v. *Zandford*, 535 U.S. 813, 815-816 (2002).

- *United States* v. *Royer*, 549 F.3d 886 (2d Cir. 2008). The administrator of a web site that provided stock-trading advice (with a promise that the defendant would not trade ahead of or against his own advice) was prosecuted for a scheme in which he obtained inside information, traded on it, directed his subscribers to trade on it, and then released it to the public. The court of appeals agreed with the government that the defendant "cheated his [web] site subscribers of the honest services he owed them," *id.* at 900-901, but this rabbinic inquiry would seem to have been entirely avoidable given that the federal securities laws (under which the defendant was also charged and convicted) have long prohibited just this sort of manipulation. See, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976).

- *Brown*. The Fifth Circuit correctly recognized that the government's approach "would expand honest-services fraud to reach all manner of accounting fraud and securities fraud, which . . . are heavily regulated under other statutes." 459 F.3d at 522 n.13.

Admittedly, many of the defendants in the cases discussed above may "have acted improperly. But '[b]ad men, like good men, are entitled to be tried and

sentenced in accordance with law.'" *Sorich*, 129 S. Ct. at 1311 (Scalia, J.) (quoting *Green* v. *United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting)). Section 1346 – whose meaning prosecutors have been allowed to "make . . . up as they go along," *Rybicki*, 354 F.3d at 160 (Jacobs, J.) – fails to deliver on that guarantee.

II. Section 1346 Imposes Intolerable Burdens on Private-Sector Dealings

Vague laws have harmful practical consequences. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (internal quotation marks omitted). The existence of section 1346, and the potential for prosecution under it, deters legitimate dealings and constitutes a major "threat . . . to legitimate and lawful business relationships and the negotiations necessary to the creation of such relationships." *Brown*, 459 F.3d at 535 (DeMoss, J.).

These burdens are compounded by the fact that every supposed deprivation of honest services is a potential predicate offense under the Racketeer Influenced and Corrupt Organizations Act (RICO). (Section 1346 says that 18 U.S.C. §§ 1341 and 1343 cover schemes to interfere with the intangible right of honest services, and under RICO, every act indictable under sections 1341 and 1343 can form part of an actionable "pattern of racketeering activity," 18 U.S.C. §§ 1961(1), (5), 1962 – itself a troublingly vague concept, as four Justices noted in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 255-256 (1989) (Scalia, J., concurring in the judgment)). Indeed, this Court has already cautioned against

broadening the reach of the mail-fraud statute precisely because of its potential to generate draconian penalties under the umbrella of RICO. *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000). The combination of RICO and "honest-services fraud" exemplifies the alchemy of amorphousness through which modern federal prosecutors pursue nebulous but far-reaching theories of liability. See, *e.g.*, *United States* v. *Gray*, 521 F.3d 514, 521 (6th Cir. 2008) (racketeering-conspiracy convictions apparently based partly on honest-services fraud).

This mischief, moreover, extends to *civil* RICO suits. "[T]here is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys." William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989). Sure enough, plaintiffs' lawyers have figured out how to use section 1346 in conjunction with RICO to threaten businesses with treble damages and attorneys' fees under 18 U.S.C. § 1964(c). In one recent case, for example, the plaintiff alleged that one of its employees and its outside licensing agent had double-dealt in negotiations with other parties over the plaintiff's intellectual-property rights. *World Wide Wrestling Entm't, Inc.* v. *Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 492-494 (S.D.N.Y. 2007). Rather than limit itself to traditional causes of action in tort, the plaintiff asserted civil RICO claims. The court concluded that the complaint sufficiently alleged a "pattern of racketeering activity" insofar as the employee's and outside agent's undisclosed dealings had deprived the plaintiff of its intangible right to their honest services in violation of section 1346. *Id.*

at 495, 498, 507, 514.[2] Allegations like these – which are by no means unique, see, *e.g.*, *TransFirst Holdings, Inc.* v. *Phillips*, 2007 WL 631276, at *12 (N.D. Tex. Mar. 1, 2007); *Hexagon Packaging Corp.* v. *Manny Gutterman & Assocs.*, 1997 WL 323501, at *10 (N.D. Ill. June 9, 1997) – only magnify the unwarranted burdens that section 1346 imposes on American business.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

LAWRENCE S. ROBBINS*
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

AUGUST 2009

[2] The court dismissed the RICO claims for other reasons. See *id.* at 524, 530.

AMICUS CURIAE BRIEF

140 (8)

No. 08-876

In The
Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,
Petitioners,

v.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF RESPONDENT

Anne L. Weismann
Counsel of Record
Melanie Sloan
CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON
1400 I Street, N.W., Suite 450
Washington, D.C. 20005
(202) 408-5565

Counsel for Amicus Curiae

September 17, 2009

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

This brief addresses the following questions implicated by the petition for a writ of certiorari:

1. Whether prosecution under the federal honest services fraud statute, 18 U.S.C. § 1346, requires the government to prove a defendant's scheme to defraud the public of the honest services of a public official threatened or caused tangible harm.

2. Whether 18 U.S.C. § 1346 is void for vagueness, at least as applied to schemes to defraud the public of the honest services of public officials.

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INTEREST OF *AMICUS CURIAE*[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the activities of members of Congress and, where appropriate, files ethics complaints with Congress. CREW also prepares written reports, including a yearly report it disseminates publicly about the most unethical members of Congress.

CREW's core beliefs include the belief that no public official is above the law and that our nation's laws must be applied equally to all. CREW files its brief as an entity that monitors the legislative branch to ensure the people are represented by honest officials working for the public interest, rather than their own personal, pecuniary interests. Toward that end, CREW advances a construction of 18 U.S.C. § 1346 (the honest services fraud statute) that preserves its utility as an indispensable prosecutorial tool for fighting public corruption.

---

[1] Counsel of Record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No party or counsel for any party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. Congress, responding to this Court's invitation to "speak more clearly" its intent to criminalize government corruption under the mail fraud statute, *McNally v. United States*, 483 U.S. 350, 360 (1987), enacted 18 U.S.C. § 1346 in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988). The statute punishes as mail fraud under 18 U.S.C. § 1341 use of the mails to execute "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1341. Through section 1346, Congress intended to target public sector corruption, and the statute has proven an invaluable prosecutorial tool for this purpose. *See* John C. Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 456-59 (1998) (discussing the emphasis on public corruption in House and Senate discussion of section 1346).

Although public corruption may be prosecuted under a number of statutes, the honest services statute offers pronounced advantages when prosecuting bribery, with its difficult requirement of proving a *quid pro quo* – an intent to influence or be

influenced.[2] A well-established application of section 1346 allows prosecutors to indict public officials on the basis of their intentional non-disclosure of a material conflict of interest (a conflict often created by the acceptance of bribes). *See, e.g., United States v. Woodward*, 149 F.3d 46, 30 (1st Cir. 1998); *see also United States v. Panarella*, 277 F.3d 678, 697 (3d Cir. 2002) (a public official's duty to disclose conflicts of interest arises in part from the practical difficulty of detecting and prosecuting bribery schemes). Securing a conviction under section 1346 requires proof only of the official's intent to deceive with respect to material information, a much easier evidentiary burden than the bribery statutes impose. Prosecutors also regularly use the intentional non-disclosure basis of liability recognized in section 1346 to prosecute self-dealing schemes. *See, e.g., United States v. Jennings*, 487 F.3d 564, 578 (8th Cir. 2007). As a result, section 1346 has become an indispensable weapon in the prosecutorial arsenal for fighting government corruption.

A. Universally limiting the scope of section 1346 to only those schemes that result in tangible economic impact under the "reasonably foreseeable harm" test petitioner advances would deprive prosecutors of this critical tool. Such a limitation

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[2] Conviction under 18 U.S.C. § 201(b)(1)(A) (bribery of public officials and witnesses) requires proof of a defendant's "intent 'to influence' an official act or 'to be influenced' in an official act." *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999). Conviction under 18 U.S.C. § 666(a)(1)(B) (theft or bribery concerning programs receiving federal funds) requires proof of a public official's "intent to be influenced or rewarded" by the receipt of a thing of value. *United States v. Gee*, 432 F.3d 723, 714-15 (7th Cir. 2005).

could also, like this Court's decision in *McNally*, "thr[o]w hundreds of convictions into doubt and threaten[] the continuance of dozens of ongoing corruption and election fraud cases," sending prosecutors on a search for new legal arguments to "salvage convictions . . . now under a cloud." U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 1987* 5 (1987).

At both the federal and state levels, honest services charges have been brought against public officials and their paymasters who have engaged in the most reprehensible betrayals of the public trust. Honest services fraud charges factored prominently in the indictments brought against former lobbyist Jack Abramoff and his associates and co-conspirators, who participated in one of the most visible public corruption scandals in recent history.[3] State and local officials subjected to prosecution under section 1346 have included governors, state legislators, mayors, and an assortment of

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[3] Others indicted in the Abramoff scandal include Michael Scanlon, former public relations specialist; former Congressman Robert Ney; former lobbyist Kevin Ring; Tony Rudy, former lobbyist and staffer for former Congressman Tom Delay; Neil Volz, former lobbyist and Chief of Staff to Congressman Ney; William Heaton, former Chief of Staff to Congressman Ney; and Mark Zachares, former staffer to the House of Representatives Transportation and Infrastructure Committee. *See* U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2007* 18-24 (2007); U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2006* 15-16 (2006); *United States v. Ring*, 2009 U.S. Dist. LEXIS 54007 (D.D.C. 2009). The prosecution of Mr. Ring is ongoing.

appointees,[4] and the prosecution of former Illinois governor Rod Blagojevich is ongoing. *United States v. Blagojevich (In re Motion to Disclose Intercepted Communs.)*, 594 F. Supp. 2d 993 (N.D. Ill. 2009). Because state prosecutors may be reluctant to bring charges against their political allies or supporters, federal prosecutors with no such connections play an indispensable role in holding corrupt politicians accountable. *See Panarella*, 277 F.3d at 694. The critical role of the honest services fraud statute in combating federal, state, and local corruption weighs strongly against adopting an interpretation of 18 U.S.C. § 1346 that would apply a "reasonably foreseeable harm" test to public sector cases to criminalize only those schemes that threaten victims with tangible (money or property) harm.

B. Nor would such an interpretation accord with either congressional intent in enacting section 1346 or the judicially articulated rationales for applying the reasonably foreseeable harm test to private sector cases. No court, pre- or post-*McNally*, has required the government to prove a defendant's scheme to deprive the public of a public official's honest services threatened the public with tangible harm. Certainly the enacting Congress could not have intended for the reasonably foreseeable harm test to be applied to public sector cases; section 1346 was enacted to overrule *McNally* and reinstate prior honest services case law, which extended liability "to schemes to defraud another of intangible rights,

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[4] *See, e.g., Jennings*, 487 F.3d 564 (legislator); *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1911 (2008) (mayor); *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995) (state lottery director).

including an intangible right of honest services." *United States v. deVegter*, 198 F.3d 1324, 1327 (11th Cir. 1999), *quoting United States v. Lopez-Lukis*, 102 F.2d 1164, 1168-69 (11th Cir. 1997).

Courts developed the "reasonably foreseeable harm" test to address unique features of the private sector employer-employee relationship, and the test has no rational application beyond that context. The premise underlying the test's applicability to the private sector is that because employee loyalty presents no "significant benefit" to a private sector employer, only those schemes involving "a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer" should be subject to prosecution as honest services fraud. *United States v. Lemire*, 720 F.2d 1327, 1336, 1337 (D.C. Cir. 1983). In other words, only those betrayals that put the private sector employer at financial risk may serve as the basis for an honest services fraud charge.[5] By contrast, "[p]ublic officials may be held to a higher standard of public trust; and conflicts of interest may harm the public merely by giving the illusion of unfairness." *Id.* at 1337 n.13. The corrupt acts of public officials deprive the public of the intangible, but no less important right "either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).

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[5] Even in the private sector context the law is mixed as to whether proof of a tangible, economic harm is required in order to secure a conviction for honest services fraud, as the Seventh Circuit's ruling here illustrates.

II. Nor is the Court required to adopt the limiting construction advanced by petitioner to save section 1346 from being void for vagueness. A statute is impermissibly vague only when it fails to provide notice of the conduct it proscribes or encourages arbitrary or discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 356 (1983). And a statute that threatens no constitutionally protected conduct is facially vague only when vague in all of its applications. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

Petitioner's vagueness argument rests on the proposition that the "right to honest services" lacks a commonly understood or recognized meaning, rendering it constitutionally infirm. This ignores the conduct at the core of the case law Congress reinstated with the enactment of section 1346 – bribery, kickback, and self-dealing schemes – that is subject to prosecution under the honest services fraud statute. Given this well-developed body of case law, no public official plausibly can claim a lack of knowledge that engaging in such conduct will subject the official to criminal liability under section 1346. The honest services fraud statute neither fails to provide perpetrators of these schemes fair notice of the conduct prohibited nor gives law enforcement too much discretion.

ARGUMENT

I. THE COURT SHOULD REFRAIN FROM INTERPRETING SECTION 1346 AS IMPOSING A REASONABLY FORESEEABLE HARM LIMITATION ON PROSECUTION OF SCHEMES TO DEFRAUD THE PUBLIC OF THE HONEST SERVICES OF PUBLIC OFFICIALS.

A. The Rationale Behind The Reasonably Foreseeable Harm Limitation Does Not Apply To Public Sector Cases.

Petitioner advances a construction of section 1346 that would, under a "reasonably foreseeable harm test," limit the statute's reach to only those schemes that threaten their victims with tangible, economic harm. Developed in response to the unique character of the private sector employer-employee relationship, the reasonably foreseeable harm test purports to correspond to the reality of that relationship, in which "[e]mployee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the employer." *Lemire*, 720 F.2d at 1336. Following this premise, the *Lemire* court interpreted the mail and wire fraud statutes as reaching "only breaches of duty that are accompanied by a misrepresentation or non-disclosure that is intended or is contemplated to deprive the person to whom the duty is owed of some legally significant benefit." *Id.* at 1335. Under this approach, where employee loyalty is not viewed, in and of itself, as a "significant benefit" to a private sector employer, the employer is deprived of the

honest services of his or her employees only when their conduct involves "a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.* at 1337.

The rationale for this limiting construction of the honest services fraud statute in the private sector context does not, however, extend to public sector cases. Public officials are held "to a higher standard of public trust" than their private counterparts, and "conflicts of interest may harm the public merely by giving the illusion of unfairness." *Lemire*, 720 F.2d at 1337 n.13. Public corruption deprives the public of government transparency, a benefit no less "legally significant" than the tangible, economic harm a private employer may face when deprived of an employee's honest services. More specifically, "[w]hen an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." *Sawyer*, 85 F.3d at 724. Because transparency is undermined whenever a public official engages in a secret scheme motivated by private gain rather than public interest – whether or not the scheme also causes tangible injury to the public – official loyalty *is* an end in and of itself. Correspondingly, betrayal of this loyalty is actionable under section 1346. *See deVegter*, 198 F.3d at 1328-29.

Applying the reasonably foreseeable harm test to the public sector context would leave many truly

reprehensible corrupt acts of bribery or self-dealing unpunished because they did not threaten the public with a tangible loss. The example offered by Professor Coffee – a legislator who receives a series of bribery payments to oppose legislation where the legislator independently opposes the legislation for "good" public policy reasons – illustrates the folly of such an application. "The legislator may sincerely believe that the legislation is ill-advised, but the bribery is no less corrupt as a result." Coffee, *supra* at 451. That corruption deprives the public of the official's honest services even where his actions in opposing legislation may, standing alone, actually benefit the public. That is why the honest services fraud statute, at least in the public sector context, focuses on "the manner in which officials make their decisions," and not the "results of a legislative decision." *Lopez-Lukis*, 102 F.3d at 1169.

Moreover, in the public sector context it is difficult to "meaningfully measure 'harm.'" Coffee, *supra* at 451. Public policy matters are practically defined by reasonable disagreement "over which of the many competing interests in society deserve support from the state,"[6] and one person's loss can be another's gain. This dynamic, in turn, reinforces the public's underlying interest in transparency itself, which allows the public to "evaluate the motivations of public officials who are purporting to act for the common good to determine whether they are in fact acting for their own benefit." *Id.* Depriving the public of such transparency is no less a deprivation of a "legally significant benefit[]," *Lemire*, 720 F.2d

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[6] *United States v. Weyhrauch*, 548 F.3d 1237, 1247 (9th Cir. 2008), *cert. granted in part*, 129 S. Ct. 2863 (2009).

at 135, than depriving a private sector employer of a tangible economic benefit.

Recognizing the critical differences between the public and private sector, those circuits that have adopted the reasonably foreseeable harm test have been careful to cabin its application to private sector conduct. *See, e.g., deVegter*, 198 F.3d at 1328 ("The meaning of the intangible right of honest services has different implications, however, when applied to public official malfeasance and private sector misconduct."); *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997) ("[W]e stress that we are not reviewing the standard applicable to defendants accused of depriving the public of the honest services of public officials."). *See also United States v. Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (rejecting argument that defendants' convictions should be reversed because their scheme had caused no "cognizable harm" and had, in fact, "furthered the public good"); *United States v. Mack*, 159 F.3d 208, 215-16 (6th Cir. 1998) (lower court did not err in failing to charge the jury with finding defendant had caused "concrete business harm" to his public sector employer or to the people of Ohio); *Lopez-Lukis*, 102 F.3d at 1169 ("That the result of the bribed commissioner's vote actually benefits the electorate would not change the fraudulent nature of her conduct.").

B. By Targeting As Actionable Under Section 1346 Conduct That "Defraud[s]," Congress Did Not Intend To Criminalize Only Those Schemes That Threaten Tangible Harm.

The mail fraud statute, by its express terms, criminalizes a "scheme or artifice to defraud," 18 U.S.C. § 1341, that section 1346 defines to include "a scheme or artifice to deprive another of the intangible right of honest services." Petitioner argues Congress' use of the word "defraud" – contended to be a term of art – necessarily encompasses only conduct that results in a "pecuniary loss to another." Pet'r's Brief 27. The fallacy of this argument is revealed both by Congress' intent in enacting the statute and the pre-*McNally* case law Congress reinstated through section 1346.

Congress enacted section 1346 in response to this Court's invitation to "speak more clearly" Congress's intent to criminalize government corruption under the mail fraud statute. *McNally*, 483 U.S. at 360. Intended to incorporate pre-*McNally* case law,[7] section 1346 focuses on fraud that results in the deprivation of "the *intangible* right of honest services." 18 U.S.C. § 1346 (emphasis added).

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[7] *See* 134 Cong. Rec. S17360 (daily ed. Nov. 10, 1988) (intent of section 1346 "is to reinstate all of the pre-McNally caselaw pertaining to the mail and wire fraud statutes without change.").

Pre-*McNally* case law did not limit actionable fraud to only that which resulted in a threat of tangible harm, particularly in the public sector context. As discussed *infra*, even those pre-*McNally* private sector cases such as *Lemire* that applied a reasonably foreseeable harm test excepted public corruption cases from this analysis. "Public officials may be held to a higher standards of trust; and conflicts of interest may harm the public merely by giving the illusion of unfairness." *Lemire*, 720 F.2d at 1337 n.13. In *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), Judge Friendly declined to extend the honest services doctrine to a private sector scheme that did not threaten its victim with economic harm, but recognized that fraud not resulting in economic harm may still be actionable in the public sector context:

> This doctrine of the deprivation of honest and faithful services has developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage, often by taking bribes. Such actions may not deplete the fisc; indeed . . . they may have enriched it, but they are nonetheless *frauds* since the public official has been paid to act in breach of his duties.

Id. at 1400 (emphasis added). *See also United States v. Ballard*, 663 F.2d 534, 541 (5th Cir. 1981) ("[t]he standard of materiality . . . applies to employers in the private sector; public officials may have a special duty to disclose, based on the public trust, which

lowers the threshold of materiality."). And in *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987), a prominent pre-*McNally* public sector case, the court affirmed the conviction of a judge who had accepted bribes, despite the absence of "demonstrable loss either to a litigant or to the public at large." *Id.* at 308. This conclusion reflected the practical difficulty of proving tangible harm in this context: "How can anyone prove how a judge would have ruled if he had not been bribed?" *Id.*

Although some pre-*McNally* cases identified a lack of tangible harm as a factor in reversing convictions for honest services fraud in the public sector, they viewed this as part of the prosecution's overall failure to establish the defendant had engaged in a scheme to defraud at all. Far from setting a precedent that all honest services fraud convictions must be based on a showing of threatened tangible harm, these cases stand for the unremarkable proposition that the absence of injury may evidence the absence of a scheme to defraud in the first place. Thus, in *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976), an oft-cited pre-*McNally* case, the Eighth Circuit reversed the mail fraud conviction of a city plumbing inspector who repeatedly had accepted $5 "tips" accompanying plumbing permit applications from a single plumbing company. *Id.* at 1246. Unlike defendants in the typical bribery case or one involving a failure to disclose a conflict of interest, the *McNeive* defendant did not exercise discretion over the issuance of plumbing permits; the "tips" he received were not, and could not be, characterized as bribes; and there was "no evidence that McNeive materially

misrepresented any facts in order to assure continuation of the gratuities scheme or that he actively concealed the scheme." *Id.* at 1250-52. Under these facts, the absence of a "tangible or pecuniary injury" simply buttressed the court's conclusion that no scheme to defraud existed. *Id.*

Similarly, in *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), the court reversed the conviction of a state legislator who had received fees from an architectural firm in exchange for introducing the firm to state government officials responsible for awarding architectural contracts. *Id.* at 1020. Because the actual awarding of architectural contracts was not one of the defendant's duties, the court did not see how the fees paid to him could be part of a scheme to buy his discretion – he simply had no discretion to exercise. *Id.* at 1024-25. Having failed to otherwise present evidence of a scheme to defraud, the prosecution's additional failure to show the allegedly fraudulent conduct "deprived the public . . . of some potential tangible gain such as favorable contracts" provided further support for the court's conclusion there was no scheme to defraud (and therefore no honest services fraud). *Id.* at 1025. But had the prosecution been able to show the defendant's conduct "deprived the public . . . of its right to honest and fair dealing . . . or of its right to disclosure of the officer's interest in the transaction at issue," no additional showing of tangible harm would have been necessary. *Id.*

As this case law makes clear, universally limiting the application of section 1346 to schemes

that threaten tangible harm would *change*, not restore, the public sector honest services fraud law as interpreted pre-*McNally*. Congress' intent behind its enactment of section 1346 can only be realized by applying the reasonably foreseeable harm test, if at all, to private sector cases.

The legislative history of section 1346 confirms Congress knew how to make tangible harm an element of honest services fraud when it desired that outcome. Just prior to passage of the current section 1346, Congress considered the Anti-Corruption Act of 1988, S. 2973, 100th Cong. (1988). Section 2 of that Act dealt with public corruption, and would have punished "[w]hoever deprives or defrauds, or attempts to deprive or to defraud" the public of the "honest services" of a public official, without limiting actionable frauds to those that put the victim at risk of tangible harm. In contrast, section 3 of the Act, entitled "White Collar Crime," would have made punishable as a "scheme or artifice to defraud" one that "deprive[s] an organization of the intangible right of honest services in which the defendant received or attempted to receive, for the defendant or another person, anything of value *or in which the defendant intended or contemplated loss or harm to the organization*." (emphasis added). Thus, while section 3 reflects a clear and conscious choice by Congress to punish only that fraud that puts the victim at risk of tangible harm, section 2 represents a congressional decision to punish all public sector fraud, even if it neither contemplates nor results in tangible harm.

In its stead, Congress enacted the current section 1346, essentially an altered version of section 3 of the Anti-Corruption Act of 1988. With public corruption squarely in mind, Congress intended section 1346 "merely to overturn the *McNally* decision. No other change in the law [was] intended." Removing any doubt about whether tangible harm is required for future prosecution of public sector fraud, Congress excised the reference in section 3 of the Anti-Corruption Act of 1988 to "intentional or contemplated loss or harm." Thus, with the passage of section 1346 Congress put in place legislation that criminalizes public sector fraud, even if it does not intend or contemplate tangible harm.

II. SECTION 1346 IS NOT VOID FOR VAGUENESS, AT LEAST AS APPLIED TO SCHEMES TO DEFRAUD THE PUBLIC OF THE HONEST SERVICES OF PUBLIC OFFICIALS.

Under this Court's void for vagueness doctrine, a statute that threatens no constitutionally protected conduct is evaluated as applied, and is facially vague only when vague in all of its applications. *Hoffman Estates*, 455 U.S. at 494-95.[8] That a statute's application to some conduct may be "uncertain" does not render it unconstitutional. As

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[8] *Compare Kolender*, 461 U.S. at 358 n.8 ("[W]e permit a facial challenge if a law reaches a substantial amount of constitutionally protected conduct.") (internal quotations and citations omitted). *See also United States v. Rybicki*, 354 F.3d 124, 150-51 (2d Cir. 2003 (Raggi, J. concurring) (citing authority for proposition that fraud enjoys no constitutional protection).

long as the statute implicates no constitutional freedoms and applies to identified conduct – either by its own terms "or as authoritatively construed," *Smith v. Goguen*, 415 U.S. 566, 577-78 (1974), – or "requires a person to conform his conduct to an imprecise but comprehensible normative standard," *Hoffman Estates*, 455 U.S. at 495 n.7 (internal quotations and citations omitted), it will pass constitutional muster. By contrast, those statutes that specify "no standard . . . at all," such that they "ha[ve] no core," are void for vagueness. *Id.* (internal quotations and citations omitted).

In evaluating the meaning of a challenged statute, a reviewing court may look beyond the text,, to consider "'terms that have accumulated settled meaning under . . . the common law." *Neder v. United States*, 527 U.S. 1, 21 (1999), *quoting Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). From these terms, the court "'must infer, unless the statute otherwise dictates, that Congress means to incorporate the[ir] established meaning.'" *Id.*

Section 1346 has a readily identifiable core defined by Congress' reference to "*the* intangible right to honest services," (emphasis added), a phrase intended to incorporate the pre-*McNally* application of the intangible rights doctrine as applied to honest services fraud. *See, e.g., United States v. Rybicki*, 354 F.3d 124, 136-38 (2d Cir. 2003). A large and uniform body of case law (both pre- and post-*McNally*) identifies those acts clearly prohibited by the honest services fraud statute, especially as to public sector corruption. The pre-*McNally* cases, as

summarized by the *McNally* Court itself, stand for the proposition that "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud." *McNally*, 483 U.S. at 355. Even Justice Steven's dissent in *McNally* acknowledged the fiduciary duty a public official owes the public, which if violated is punishable as fraud: "if he deliberately conceals material information from [the public] he is guilty of fraud . . . the systematic and long-continued receipt of bribes by a public official, coupled with active efforts to conceal the bribe-taking from the public and the authorities . . . is fraud." *Id.* at 372 (Stevens, J., dissenting), *quoting Holzer*, 816 F.3d at 307-08. Applying this commonly understood meaning of honest services fraud, pre-*McNally* courts typically affirmed convictions of public officials for engaging in bribery and kickback schemes, as well as schemes to hide material conflicts of interest.[9] Post-*McNally* cases likewise have applied the honest services fraud statute to this same conduct, which has come to be recognized as within the "core categories" of public

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[9] *See United States v. Paradies*, 98 F.3d 1266, 1283 (11th Cir. 1996) (citing pre-*McNally* cases "uniformly construe[ing] the mail fraud statute to cover the situation where public officials received bribes or kickbacks thereby depriving the citizenry of their 'intangible right' to good and honest government.") (citation omitted). Pre-*McNally* case law also establishes non-disclosure of a material conflict of interest as a basis for a mail fraud conviction. *See United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987); *United States v. Margiotta*, 688 F.2d 108, 128 (2d Cir. 1982); *United States v. Diggs*, 613 F.2d 988, 998 (D.C. Cir. 1979); *United States v. Mandel*, 591 F.2d 1346, 1363-64 (4th Cir. 1979); *United States v. Brown*, 540 F.2d 364, 374-75 (8th Cir. 1976); *United States v. Bush*, 522 F.2d 641, 647-48 (7th Cir. 1975); *United States v. Keane*, 522 F.2d 534, 546-50 (7th Cir. 1975).

sector honest services fraud. *Sawyer*, 85 F.3d at 724; *Weyhrauch*, 548 F.3d at 1247.[10]

With the core categories of honest services fraud well-established, those who use the mails to executive bribery, kickback, or self-dealing schemes have fair notice their conduct may subject them to criminal sanctions. The scienter requirements of section 1341 alleviate any further vagueness

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[10] *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009) (citing cases recognizing bribery and conflict of interest theories); *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) ("[I]n most honest services cases, the defendant violates a fiduciary duty in return for cashkickbacks, bribes, or other payments."); *United States v. Ganim*, 510 F.3d 134, 148 (2d Cir. 2007) (recognizing bribery as basis for § 1346 conviction); *Jennings*, 487 F.3d at 578 (affirming § 1346 conviction of state legislator on conflict of interest theory); *United States v. White*, 472 F.3d 458, 460 (7th Cir. 2006) (affirming conviction on conflict of interest theory); *United States v. Middlemiss*, 217 F.3d 112, 119–20 (2d Cir. 2000) (affirming conviction of public relations officer of Port Authority on conflict of interest theory); *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (affirming § 1346 conviction of Director of Texas Workers' Compensation Commission on bribery theory); *United States v. Blumeyer*, 114 F.3d 758, 766 (8th Cir. 1997) (affirming § 1346 conviction of insurance company executives on bribery theory); *Lopez-Lukis*, 102 F.3d at 1169 ("If the official . . . secretly makes his decision based on his own personal interests – as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest – the official has defrauded the public of his honest services."); *Sawyer*, 85 F.3d at 724 ("The cases in which a deprivation of an official's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain."); *United States v. Ring*, 2009 U.S. Dist. LEXIS 54007, *18 (D.D.C. 2009) (recognizing bribery and conflict of interest theories); *United States v. Jefferson*, 562 F. Supp. 2d 719, 721–23 (E.D. Va. 2008) (same).

concerns, as prosecutors must prove a defendant's specific intent to defraud, which prevents the statute from being a trap for those who act in good faith and limits prosecutorial discretion. *See United States v. Frost*, 125 F.3d 346, 370-72 (6th Cir. 1997); *United States v. Gray*, 96 F.3d 769, 777 (5th Cir. 1996); *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995).

That the statute's absolute metes and bounds have yet to be delimited neither renders it void for vagueness nor decriminalizes the acts commonly recognized and understood to fall within its strictures. Rather, section 1346 falls into the category of statutes "that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain." *Smith*, 415 U.S. at 577-78. Invalidating the honest services fraud statute because it may blur at its edges would violate "the elementary rule . . . that every reasonable construction must be resorted to . . . in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 154 (2007) (quotations and citations omitted). Indeed where, as here, the challenged statute is susceptible to a narrower construction, federal courts have the duty to accept that construction. *Boos v. Barry*, 485 U.S. 312, 331 (1988) (citations omitted). Recognizing this duty, courts properly have applied limiting constructions to section 1346 that bound its outer reaches and eliminate separation of powers and federalism concerns. *See Kincaid-Chauncey*, 556 F.3d at 940 n.13 (surveying public sector limiting principles);

Rybicki, 354 F.3d at 145-47 (surveying private sector limiting principles).

In sum, abundant pre- and post-*McNally* case law establishes clear parameters for those who would engage in illegal and fraudulent schemes and those who would prosecute the perpetrators of such schemes. The ability of these courts to clearly define those acts falling within the proscriptions of the honest services fraud statute fatally undermines any claim the statute is void for vagueness, at least as to public sector corruption.

CONCLUSION

The Seventh Circuit's interpretation of section 1346 as not requiring proof that defendants' scheme resulted in tangible harm, at least in the context of public corruption, should be upheld.

AMICUS CURIAE BRIEF

(6)

No. 08-876

Supreme Court, U.S.
FILED
AUG 6 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

BARBARA E. BERGMAN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford Drive, N.E.
Albuquerque, N.M. 87131
(505) 277-3304
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

JONATHAN L. MARCUS
Counsel of Record
ROGER A. FORD
JAMES MCCALL SMITH
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000
Counsel for Amici Curiae

Additional counsel listed on inside front cover.

AUGUST 2009

BOTH 4X9455

Additional counsel

BARRY A. BOHRER
ALEXANDRA A.E. SHAPIRO
NEW YORK COUNCIL OF DEFENSE LAWYERS
565 Fifth Ave., 10th Floor
New York, NY 10017-2413
(212) 880-9550

Counsel for Amicus Curiae
New York Council of Defense Lawyers

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit voluntary professional bar associations that work on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

The National Association of Criminal Defense Lawyers (NACDL) was founded in 1958 and has a nationwide membership of more than 12,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the largest professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. NACDL files numerous *amicus* briefs each year in this Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. *Amicus* briefs filed by NACDL have been cited by this Court in some of its most important recent criminal-law decisions. *See, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008); *Rothgery v. Gillespie County*, 128 S. Ct. 2578,

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1. All parties have submitted letters to the Court consenting to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

2587 (2008); *Blakely v. Washington*, 542 U.S. 296, 312 (2004); *Crawford v. Washington*, 541 U.S. 36, 52 (2004).

The New York Council of Defense Lawyers (NYCDL) is a not-for-profit professional association of approximately 235 lawyers, many of whom are former prosecutors, whose principal area of practice is criminal defense in federal and state courts in New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, and promoting the proper administration of criminal justice. As *amicus*, NYCDL offers the Court the perspective of practitioners who regularly handle some of the most complex and significant white collar criminal cases in federal and state courts. NYCDL's *amicus* briefs have been cited by the Court or concurring justices in cases such as *Rita v. United States*, 551 U.S. 338, 373 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

Both NACDL and NYCDL have an interest in ensuring that federal criminal statutes provide fair notice of what conduct is prohibited and that criminal defendants are not penalized for making legitimate trial decisions.

SUMMARY OF ARGUMENT

I. This Court held in *McNally v. United States*, 483 U.S. 350 (1987), that the mail fraud statute did not protect "the intangible right of the citizenry to good government," *id.* at 356, because otherwise the statute would be too vague and would involve the federal government in issues of purely local governance. Congress responded by enacting 18 U.S.C. § 1346, which extends several federal fraud statutes to cover schemes to deprive another of "the intangible right of honest services." In doing so, Congress failed to solve either of the vagueness or federalism problems identified in *McNally*. Section 1346 provides no clear boundaries on what conduct is prohibited, rendering the statute unconstitutionally vague. Moreover, Section 1346 unduly impinges on the ability of the States to shape their own laws in a wide variety of fields traditionally within their province. As a result, Section 1346 has been used to prosecute numerous defendants for conduct that is not otherwise criminal and, if wrong at all, would amount to mere violations of civil duties such as those imposed by professional ethics rules or contracts.

A. Due process requires that a criminal law give fair warning, at the time of the offense, of what conduct is prohibited. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Accordingly, a statute must be clear and specific enough to inform the public of precisely what conduct is prohibited and to cabin law enforcement's discretion within reasonable limits. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). Section 1346 fails both of these requirements. The "intangible right of honest services" is undefined in Section 1346, has no ordinary and natural meaning, and has no settled meaning in the pre- or post-*McNally* case law.

Indeed, courts have been divided over even the most basic questions presented by Section 1346, such as the source and scope of the "intangible right." And because of Section 1346's "open-ended quality," *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007) (Easterbrook, C.J.), the statute gives prosecutors unbridled discretion to enforce their own views of "honest services." The result is a largely unconstrained federal right of "honest services" that potentially extends to a vast array of corporate, personal, and professional relationships.

B. Section 1346 also threatens to inject federal oversight into numerous areas of the law traditionally left to the States Interpreting Section 1346, as most courts of appeals have, to impose a federal-law duty to provide "honest services" irrespective of state law would, in practice, invite federal courts to create a federal common law of honest dealings, an approach which has been anathema for two centuries. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). Indeed, many courts applying Section 1346 have imposed federal duties of honesty without looking to state law or when no duty otherwise exists. The minority view, which requires an independent violation of law before finding a deprivation of the "intangible right of honest services," would still deprive States of their ability to make numerous independent policy judgments, "effect[ing] a change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Enmons*, 410 U.S. 396, 411–412 (1973)).

II. Courts uniformly acknowledge that "special interrogatories ... pose special dangers" in criminal cases, where the Sixth Amendment guarantees the right to a fair trial. *United States v. Edelkind*, 467 F.3d 791, 794 (1st Cir. 2006). Special interrogatories threaten to influence a jury's deliberations and its verdict, often to the detriment of criminal defendants. Yet the Seventh Circuit imposed an unprecedented forfeiture rule on Petitioners—who otherwise properly preserved their objection to the district court's jury instruction on honest-services fraud—merely for objecting to a special verdict form that they regarded as prejudicial.

The Seventh Circuit's new rule is without basis. Whether to propose or consent to special interrogatories is a decision properly left to defense counsel after weighing the potential prejudice to the defendant's constitutional rights. Although special interrogatories can in limited circumstances help guarantee a fair trial, the law's "traditional distaste" for them, *United States v. Coonan*, 839 F.2d 886, 891 (2d Cir. 1988), recognizes their potential prejudicial effects. Defendants should not be penalized for protecting against that clear risk. The Seventh Circuit's forfeiture rule would unfairly compel defendants either to accept prejudicial interrogatories or to forfeit objections to prejudicial instructional error. Such a rule, unjust in any setting, is especially inappropriate in this case, which in no way implicates the policy concerns that motivate forfeiture rules.

ARGUMENT

I. Section 1346 Is Unconstitutional As Applied To Breaches Of Private Duties.

More than two decades ago, in *McNally v. United States*, 483 U.S. 350 (1987), this Court held that the mail fraud statute, 18 U.S.C. § 1341, does not protect "the intangible right of the citizenry to good government." 483 U.S. at 356. The Court reasoned that accepting such a theory would leave the statute too ambiguous to provide notice of what acts were prohibited, *see id.* at 359–60, and would needlessly involve the federal government in issues of purely local governance, *see id.* at 360. Congress responded the following year by enacting 18 U.S.C. § 1346, which expanded several federal fraud statutes to cover deprivations of "the intangible right of honest services"—but which did nothing to explain what exactly that phrase means, or what its boundaries are.

Since then, prosecutors have invoked the statute in cases involving "a staggeringly broad swath of behavior," *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari), prosecuting both public officials who violate "the intangible right of the citizenry to good government," *McNally*, 483 U.S. at 356, and private employees and corporate fiduciaries who violate purely private duties.[2] Courts have struggled to define the

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2. This brief distinguishes between intangible rights corresponding to "public duties" and "private duties." In the former case, the duty is one owed to a government or to the public as a whole. While this duty is most commonly invoked in prosecutions of government officials or employees, it can also arise, for instance, when a private citizen is prosecuted for bribing or

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limits of Section 1346, asserting that it "does not encompass every instance of official misconduct," *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996), and is "not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing," *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003). Although everyone seems to agree that some limiting principles are needed, none of the myriad proposed limitations has gained more than a few adherents among the circuit courts.

The impetus to identify limiting principles stems from the recognition that Section 1346 is extraordinarily vague: "There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). As explained below, Section 1346 is unconstitutionally vague because it fails to provide fair notice of what is prohibited and creates an undue risk of arbitrary

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wrongly influencing a public official, *see, e.g., United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), or when a private citizen has a non-employee duty to the government, *see, e.g., United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991) (duty to pay state income taxes); *United States v. Porcelli*, 865 F.2d 1352 (2d Cir. 1989) (duty to collect state sales taxes). In contrast, private duties are those that arise between private citizens or entities. Professor Coffee draws a similar distinction between "public fiduciary" cases and "private fiduciary" cases, *see* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427, 430 n.15 (1998). We use the "duties" terminology in this brief because fiduciary duties are but one category of duties implicated by Section 1346.

enforcement. Moreover, the statute unduly impinges on the ability of the States to shape their own laws in a wide variety of fields, from fiduciary duties in contract and tort laws to criminal fraud and corporate governance. For both of these reasons, this Court should hold that Section 1346 is unconstitutional as applied to purely private conduct.[3]

A. Section 1346 fails to give private actors fair notice of what conduct is prohibited.

Due process requires that a criminal statute give fair warning at the time of the offense of what conduct is prohibited. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). A statute that fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), or fails to "establish minimal guidelines to govern law enforcement," *id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)), is unconstitutionally vague. Section 1346 fails both of these tests.

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3. *Amici* agree with Petitioners that a scheme to defraud another of the intangible right of honest services requires that the defendant contemplate economic harm to the victim. But that requirement does not cure the vagueness and federalism problems inherent in the undefined phrase "intangible right of honest services" as applied to private duties. This Court may face these same issues, in the public context, in another case to be argued this Term, *Weyhrauch v. United States*, *cert. granted*, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-1196). *Amici* expect to seek consent to file an *amicus* brief in *Weyhrauch* arguing that Section 1346 is unconstitutional as applied to public actors. This brief addresses the statute's constitutional infirmities in the private context.

1. The plain text of Section 1346 "simply provides no clue to the public or the courts as to what conduct is prohibited under the statute." *United States v. Rybicki*, 354 F.3d 124, 158 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting) (quoting *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002)). Section 1346 states only that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 The section does not define "intangible right of honest services," and it leaves unanswered numerous questions about that concept. There might be no vagueness problem if the phrase "intangible right of honest services" was otherwise well defined—say, if the phrase had an ordinary and natural meaning. But it does not. Likewise, there might be no vagueness problem if Congress had simply borrowed a term of art, but it did not. Instead:

> The term "intangible right" is not defined in the United States Code, is not defined in *Black's Law Dictionary*, and, prior to its use in § 1346, had never been used in any other statute of the United States. The term "honest services" is not defined anywhere in the United States Code, is not defined in *Black's Law Dictionary*, and had never been used in the United States Code prior to its use in § 1346. The phrase "the intangible right of honest services" is, therefore, inherently undefined and ambiguous.

United States v. Brumley, 116 F.3d 728, 742 (5th Cir. 1997) (en banc) (Jolly and DeMoss, JJ., dissenting). Nor is "intangible right" or "honest services" defined in *Webster's Third New International Dictionary* (1993) or *The Oxford English Dictionary* (2d ed.

1989). There accordingly was no commonly understood or well-defined meaning, legal or popular, when Congress passed Section 1346.

Similarly, the phrase "intangible right of honest services" did not have a settled common-law meaning on which Congress could have relied. *McNally* did not define the "intangible rights" theory or "honest services"; indeed, the Court concluded that recognizing such a theory would "leave[] [the mail fraud statute's] outer boundaries ambiguous." 483 U.S. at 360. And before *McNally* the courts of appeals were badly divided on what exactly the "intangible rights" or "honest services" doctrine meant. *See, e.g., Brumley*, 116 F.3d at 733–34 (en banc) (noting that "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion," because "before *McNally* the doctrine of honest services was not a unified set of rules" and "the meaning of 'honest services' was uneven").

Nor has the situation improved: "the Courts of Appeals have spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles. No consensus has emerged." *Sorich*, 129 S. Ct. at 1309 (Scalia, J., dissenting from denial of certiorari). Instead, the courts of appeals remain divided today on their interpretations of Section 1346, including on issues such as:

- whether a violation of independently applicable law is required or whether, in contrast, the duty to provide honest services is a self-contained federal-law duty imposed implicitly by Section 1346[4];

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4. *Compare, e.g., Brumley*, 116 F.3d at 734–35 (5th Cir.) (en banc) (Section 1346 requires violation of an independently ap-

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- whether the defendant must contemplate some personal gain[5] or potential harm to the victim[6]; and

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plicable law), *and United States v. Murphy*, 323 F.3d 102, 116–17 (3d Cir. 2003) (same), *with United States v. Frost*, 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs the existence of fiduciary duty under the mail fraud statute."), *United States v. Sorich*, 523 F.3d 702, 712 (7th Cir. 2008) (Section 1346 does not require violation of independently applicable law), *cert. denied*, 129 S. Ct. 1308 (2009), *United States v. Urciuoli*, 513 F.3d 290, 298–99 (1st Cir. 2008) (same), *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007) (same), *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1995) (same), *and United States v. Weyhrauch*, 548 F.3d 1237, 1245 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-1196).

5. *Compare, e.g., United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998) (defendant must contemplate some personal gain), *and United States v. Thompson*, 484 F.3d 877, 882 (7th Cir. 2007) (same), *with United States v. Panarella*, 277 F.3d 678, 691–92 (3d Cir. 2002) (criticizing the Seventh Circuit approach and holding no private gain is required), *and Welch*, 327 F.3d at 1107 (10th Cir.) (same).

6. *Compare, e.g., United States v. Vinyard*, 266 F.3d 320 (4th Cir. 2001) (economic harm to victim must be reasonably foreseeable), *Frost*, 125 F.3d at 368 (6th Cir.) (same), *United States v. deVegter*, 198 F.3d 1324, 1328–30 (11th Cir. 1999) (same), *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 973–74 (D.C. Cir. 1998) (same), *and United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999) (actual harm to victim must be caused or intended), *with United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006) (breach of duty to disclose, with no concrete harm to victim, is sufficient), *Welch*, 327 F.3d at 1107 (10th Cir.) (no contemplated harm is required), *and United States v. Black*, 530 F.3d 596 (7th Cir. 2008) (same), *cert. granted*, 77 U.S.L.W. 3632 (U.S. May 18, 2009) (No. 08-876) (decision under review).

- whether pre-*McNally* "honest services" case law is even relevant today, and if so, what it means.[7]

When this Court said in *McNally* that Congress "must speak more clearly," 483 U.S. at 360, before the mail fraud statute could be used to prosecute more than money or property fraud, it did not mean that Congress needed only to make clear to the *courts* that it intended to protect "intangible rights." Rather, clarity as to the *scope* of those rights was required, because that is the only way for the *public* to know what conduct is prohibited. Congress's clarity on the first point "gets us nowhere in terms of limits on prosecutorial power and notice to the public." *Rybicki*, 354 F.3d at 158 (en banc) (Jacobs, J., dissenting). As Judge Jacobs observed, writing for himself and three other dissenting judges of the Second Circuit:

> No one can know what is forbidden by § 1346 without undertaking the "lawyer-like task" of answering the following questions: [1] Can pre-

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7. *Compare, e.g., Frost*, 125 F.3d at 364 (6th Cir.) (Section 1346 restored pre-*McNally* case law), *United States v. Czubinski*, 106 F.3d 1069, 1076 (1st Cir. 1997) (same), *and Rybicki*, 354 F.3d at 145 (2d Cir.) (en banc) (pre-*McNally* case law is relevant to determining Congress's understanding of "intangible right of honest services," but is not "precedent"), *with Brumley*, 116 F.3d at 733–34 (5th Cir.) (en banc) (looking to Section 1346's "plain language" because pre-*McNally* case law "was not a unified set of rules"). This Court has observed in dictum that Section 1346 amends the law to cover "one of the 'intangible rights' that lower courts had protected under [the mail fraud statute] prior to *McNally*: 'the intangible right of honest services,'" *Cleveland v. United States*, 531 U.S. 12, 20 (2000), although that observation does not tell us whether those pre-*McNally* honest-services cases have continued viability.

> *McNally* case law be consulted to illuminate the wording of § 1346? [2] Can any meaning be drawn from the case law, either the uneven pre-*McNally* cases or the few cases decided post-§ 1346? [3] Is one to be guided only by case law within one's own circuit, or by the law of the circuits taken together (if that is possible)?

Id. at 159 (en banc) (Jacobs, J., dissenting) (brackets in original) (quoting *Handakas*, 286 F.3d at 105). Notice is insufficient when it requires lay persons to consider such amorphous factors and "perform[] the lawyer-like task of statutory interpretation by reconciling the text of [] separate documents" simply to determine what acts are crimes. *Rybicki*, 354 F.3d at 158 (en banc) (Jacobs, J., dissenting) (citing and quoting *Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir. 1999)).[8]

2. Section 1346 also fails the second and "more important" piece of the due process test for criminal

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8. The fair-notice concern is particularly acute when Section 1346 is interpreted to require a violation of independently applicable state law. *See Murphy*, 323 F.3d at 116–17; *Brumley*, 116 F.3d at 734–35. Under that construction, the federal crime of mail fraud would be defined, in part, by myriad sources of state law, civil and criminal, not all necessarily enacted by a legislature or providing the notice required by due process. "[I]t is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime punishable by [twenty] years' imprisonment to misunderstand how a state court in future years will delineate the extent of impermissible conflicts. Then we would have a federal common-law crime, a beastie that many decisions say cannot exist." *Bloom*, 149 F.3d at 654 (Easterbrook, J.) (citing *United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812)).

statutes: "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). The statute at issue in *Kolender* required suspects to provide "credible and reliable" identification to police and to "account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*." 461 U.S. at 353. The Court struck down the statute because it

> contain[ed] no standard for determining what a suspect ha[d] to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.

Id. at 358. The statute thus "furnishe[d] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 360 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

The text of Section 1346 similarly places no limits or standards on when prosecution may be warranted. The absence of any standard to cabin prosecutorial discretion regarding what constitutes a violation of the "intangible right of honest services" is illustrated by cases as disparate as these:

- Officials have been prosecuted for failure to disclose conflicts of interest, even when they do not benefit from those conflicts. *See, e.g., Bryan*, 58 F.3d 933.

- University students and professors were prosecuted for a scheme by which the professors helped the students obtain unearned degrees, in exchange for assistance from the students in obtaining government contracts. *See Frost*, 125 F.3d 346 (affirming some convictions and reversing others as involving mailings too remote from the fraud).
- A sports agent was prosecuted for bribing college athletes to sign representation agreements, in violation of NCAA rules but no federal or state statute. *See United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993) (reversing conviction).

Prosecutors were equally aggressive before *McNally:*

- A lawyer was prosecuted for representing a client while his large law firm represented a competing client seeking a public franchise. *See United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981).
- A private individual was prosecuted for enticing women to engage in sexual conduct with false promises that he could get them acting or modeling jobs. *See United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979).
- Private investigators were prosecuted for obtaining customer telephone records for use in pursuing debtors. *See United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978).

Because of the "open-ended quality" of Section 1346, *Thompson*, 484 F.3d at 884 (Easterbrook, C.J.), and the lack of a "coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated," *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari), the statute, like the provision at issue in

Kolender, invites "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." 461 U.S. at 360.

* * *

Applying Section 1346 to private duties would implicate a broad array of corporate, personal, and professional relationships. Resolving the myriad questions raised by such applications would require accepting Section 1346's "invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). This Court should refuse to do so.

B. Section 1346 impinges on the States' ability to shape their own laws in a wide variety of fields.

Under the Constitution's federalist structure, the regulation of numerous types of conduct is traditionally the province of the States, unless, at a minimum, Congress has expressly spoken to the question. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1094 n.6 (1991) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)). Section 1346 threatens to upend this principle and inject federal oversight into numerous areas of the law traditionally left to the States.

1. Section 1346 threatens to replace many state regulations with a new federal law of "honest services." The majority of courts of appeals to consider the question have held that the "intangible right of

honest services" is a right defined by federal law, requiring no discussion of state-law rights and duties.[9] Many of the same kinds of legal rights and duties involved in honest-services cases routinely arise under state law, in a diverse and wide-ranging set of fields. Yet courts applying Section 1346 have imposed their own view of these duties, on top of and unmoored from the state laws that usually govern, and have prosecuted individuals for actions that, if wrong at all, may amount only to a civil violation or potential tort under state law. Courts have thus frequently superimposed a far-reaching and ill-defined federal law of duties on top of preexisting state-law duties of care.[10]

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9. *E.g.*, *Bryan*, 58 F.3d at 940 (4th Cir.); *Frost*, 125 F.3d at 366 (6th Cir.); *Bloom*, 149 F.3d at 653–57 (7th Cir.); *Weyhrauch*, 548 F.3d at 1245 (9th Cir.), *cert. granted* (No. 08-1196); *Walker*, 490 F.3d at 1299 (11th Cir.). *Cf. Urciuoli*, 513 F.3d at 298–99 (1st Cir.) (relevance of state law may depend on "precisely what the government has charged"). *Contra Murphy*, 323 F.3d at 116–17 (3d Cir.); *Brumley*, 116 F.3d at 734–35 (5th Cir.) (en banc). The majority view is consistent with *McNally*'s interpretation of the honest-services doctrine. *See* 483 U.S. at 361 n.9; *id.* at 376 n.10 (Stevens, J., dissenting).

10. This problem is not unique to private duties; the troubling federalism implications of applying Section 1346 to public actors have been frequently noted by commentators and judges. *See, e.g.*, *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari); *Panarella*, 277 F.3d at 693 (Becker, C.J.); Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427. *Cf. McNally*, 483 U.S. at 360. While the federalism implications of applying Section 1346 to *private* actors have been comparatively unexplored, private applications of Section 1346 would touch a far broader array of corporate, personal, and professional relationships ordinarily left to state regulation.

Examples include:

- *Corporate governance.* Corporate governance is generally the subject of state law, in part because it "is regulation of entities whose very existence and attributes are a product of state law." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (citing *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)). Corporate managers owe their corporations duties of loyalty and care. *See generally* Robert Charles Clark, *Corporate Law* 126–36, 141–57 (1986); William E. Knepper & Dan A. Bailey, *Liability of Corporate Officers and Directors* §§ 1.01 to 1.18 (2008). Managers' duties under state laws are, however, typically quite limited: absent a showing of fraud, a conflict of interest, or illegality, managers are generally presumed to have acted in good faith and an honest belief that their actions were taken in the best interests of the company. Clark, *Corporate Law* 123–25. Yet defendants have been convicted of honest-services fraud without analysis of whether their actions violated any state-law corporate law duty. *See, e.g., deVegter*, 198 F.3d at 1327–30 (citing cases).

- *Privacy law.* In most States, the common-law tort of invasion of privacy protects individuals from four types of privacy invasions: intrusion upon seclusion; public disclosure of private facts; false light; and misappropriation of the individual's name or likeness. *See* Restatement (Second) of Torts §§ 652A–652E (1977); William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960) (canvassing the state decisions). The precise details of these duties vary from State to State, and not all States recognize all of them; yet individuals have been

prosecuted for honest-services mail fraud after violating nebulous privacy rights untethered to otherwise-applicable privacy law. *See, e.g., Czubinski*, 106 F.3d 1069 (reversing conviction of IRS employee who examined taxpayer records without authorization); *Condolon*, 600 F.2d 7 (defendant obtained sexual favors on false pretenses); *Louderman*, 576 F.2d 1383 (defendant obtained personal information from telephone company under false pretenses, when state false-pretenses law applied only to tangible property).[11]

- *Professional responsibility.* State laws generally regulate the duties that attorneys, doctors, and other professionals owe to their clients. Because those professionals are indisputably providing "services," Section 1346 could impose an independent federal duty to provide "honest services" that is entirely unrelated to the governing rules of professional conduct. Imposing a federal duty could also lead to penalties far greater than the States have chosen to impose. For example, one lawyer was prosecuted for secretly representing a client with interests adverse to another client of his firm, even though the representation potentially amounted to a mere ethics violation, not a

11. The dissent in *McNally* specifically mentioned previous honest-services cases involving "privacy and other nonmonetary rights." 483 U.S. at 364 (Stevens, J., dissenting). Although at least one court of appeals has concluded that such cases no longer come within the mail fraud statute, *see Rybicki*, 354 F.3d at 138 n.13 (en banc), in other circuits they remain viable as pre-*McNally* honest-services case law revived by Section 1346, *see, e.g., Frost*, 125 F.3d at 364.

criminal offense, under state law. *See Bronston*, 658 F.2d 920.[12]

Similar stories could be told about contract law, tort law, employment law, and most other areas of state law and regulation.

In short, even though Section 1346's reference to "*the* intangible right of honest services" (emphasis added) implies that the mail fraud statute protects preexisting intangible rights and does not create new rights, in numerous cases courts have found violations without analyzing, or even requiring, any such clear preexisting right. They have done so by imposing new federal duties in areas of the law traditionally governed by the States. While those federal duties may be largely consistent with the dominant state-law rules, they amount to little more than a federal judicial gloss on what those duties *should* be, rather than what they *are*. *Cf. Santa Fe Industries v. Green*, 430 U.S. 462 (1977) (declining to extend the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5 (2009), to areas traditionally governed by state law). And it is not hard to imagine expanding this approach to other areas in which state law has historically defined rights and duties. To give just two more examples:

- *Insurance.* By federal statute, insurance regulation is left to the States unless a federal statute "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Under all States' insurance

12. *Bronston* did not involve the misappropriation of any of the "victim" client's confidential information. *Cf. Carpenter v. United States*, 484 U.S. 19 (1987) (affirming conviction of *Wall Street Journal* columnist who sold confidential information about the column's future contents).

laws, insurance contracts contain an implied duty of good faith and fair dealing. The source and scope of that duty, however, vary widely from State to State.[13] Nevertheless, Section 1012(b)'s limitation has been held not to block prosecutions of insurers under the mail fraud statute, *see, e.g., United States v. Blumeyer,* 114 F.3d 758, 768 (8th Cir. 1997); *United States v. Sylvanus,* 192 F.2d 96, 100 (7th Cir. 1951). Indeed, the mail fraud statute is routinely used to prosecute fraud on insurance companies, *see, e.g., United States v. Loder,* 23 F.3d 586 (1st Cir. 1994), and it is not hard to imagine a prosecution for violating the insurer's duty of good faith as an "intangible right of honest services," interpreted without reference to detailed and non-uniform state insurance law.

- *Family law.* Generally, spouses have fiduciary duties to each other, although the precise contents of these duties vary from State to State. *See, e.g.,* Cal. Fam. Code. § 721(b) (Deering 2009); *Christian v. Christian,* 365 N.E.2d 849, 855 (N.Y. 1977). Similarly, parents have duties to provide and care for their children. Although federal law generally leaves such family-law issues to state law, Section 1346 could make a federal crime out

13. For example, the insurer's duty of good faith can arise out of common-law tort, *e.g., Auto Mut. Indem. Co. v. Shaw,* 134 Fla. 815, 184 So. 852 (1938), contract, *e.g., Johnson v. Federal Kemper Ins. Co.,* 74 Md. App. 243, 536 A.2d 1211 (Md. Ct. Spec. App. 1988), or statute, *e.g.,* Conn. Gen. Stat. § 38a-816 (2008). It can apply only to third-party claims, *e.g., Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co.,* 753 So. 2d 1278, 1281 (Fla. 2000), or to first-party claims as well, *e.g., Gruenberg v. Aetna Ins. Co.,* 9 Cal. 3d 566, 573, 510 P.2d 1032, 1037 (1973).

of violating a federal court's idea of a parent's or spouse's duties.

2. Some courts have rejected the majority view and interpreted Section 1346 to apply only when the defendant violates a preexisting state-law "intangible right of honest services" that is separate and independent of Section 1346 itself.[14] But that approach—which finds no support in the text of Section 1346[15] or the pre-*McNally* case law[16]—presents its own federalism concerns.

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14. In the public context, this issue is presented this Term in *Weyhrauch, cert. granted,* No. 08-1196, 77 U.S.L.W. 3708 (U.S. June 29, 2009).

15. Section 1346 gives no indication that it incorporates other sources of law, and although federal law sometimes incorporates state laws, in the criminal law it does so explicitly. *See, e.g.*, 18 U.S.C. § 1961(a) (RICO predicate offenses, including certain acts "chargeable under State law and punishable by imprisonment for more than one year"); 18 U.S.C. § 922(b)(2) (firearm sales by federally licensed dealers when the purchase or possession of the firearm would violate purchaser's state or local law). When a statute is ambiguous, this Court is reluctant to read state law into federal criminal law, because "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

16. The honest-services doctrine before Section 1346 and *McNally* did not rely on independent violations of state law. *See McNally*, 483 U.S. at 361 n.9 (assuming that the defendants had not violated any state law); 483 U.S. at 376 n.10 (Stevens, J., dissenting) ("The mail fraud statute is a self-contained provision, which does not rely on any state enactments for its force."). In enacting Section 1346, Congress did not express any intent to change this approach.

While interpreting Section 1346 to incorporate state law would mitigate concerns about federal law imposing different or additional substantive requirements on individuals, it would still deprive States of their ability to make independent policy decisions on numerous secondary questions, including enforcement mechanisms, appropriate penalties, and the relative priorities of various laws. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)—and this is as true for remedies as for underlying substantive requirements. This Court has recognized the "fundamental interest in federalism that allows individual States to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways." *Danforth v. Minnesota*, 128 S. Ct. 1029, 1041 (2008) (holding that States may give broader effect than federal courts to new constitutional holdings). It substantially undermines that "fundamental interest" to borrow a state rule, potentially not even criminally enforceable, and turn it into a federal felony with a sentence of up to twenty years in prison, 18 U.S.C. § 1341. *Cf.* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257, 259 & nn.10–16 (2005) (citing numerous examples of States' "diverse views on criminal law matters").

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These federalism concerns are only exacerbated by Section 1346's extraordinary vagueness, which gives federal prosecutors free rein to police a vast

range of private conduct that is the traditional province of state law. This Court should therefore hold that Section 1346 is unconstitutional as applied to purely private conduct.

II. The Seventh Circuit's Novel Forfeiture Rule Is Harsh And Unwarranted.

Federal courts have long recognized the risk of prejudice posed by special verdict forms and special interrogatories in criminal cases. *See, e.g., Gray v. United States,* 174 F.2d 919, 923 (8th Cir. 1949) (noting that the use of special interrogatories in criminal cases presents "a question of due process [that] is important and far reaching"). Special interrogatories threaten to influence a jury's deliberations and thereby violate a defendant's constitutional right to a fair trial. Petitioners were therefore well within their rights in objecting to them. Yet according to the Seventh Circuit, Petitioners' decision came at the price of forfeiting their objection to the district court's instruction on honest-services fraud. The Seventh Circuit's unprecedented forfeiture rule unfairly compels defendants either to accept prejudicial interrogatories proposed by the government or to forfeit otherwise properly preserved objections to prejudicial instructional error. Imposing such a choice is especially inappropriate because the policy concerns that underlie forfeiture and waiver rules have no application here.[17]

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17. *Amici* agree with Petitioners that there is no basis in the Federal Rules of Criminal Procedure for the Seventh Circuit's forfeiture holding, and that it is therefore unfair to penalize Petitioners for having violated a rule that did not exist at the time of the trial. *Amici* write separately to emphasize the broader

(footnote continued on next page...)

A. Special interrogatories are disfavored because they threaten a defendant's right to a fair trial.

Federal courts generally disfavor special verdict forms and interrogatories.[18] Chief among the relevant concerns is "the subtle, and perhaps open, direct effect that answering special questions may have upon the jury's ultimate conclusion," there being "no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step." *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

There are at least two ways in which special interrogatories may tilt the jury's deliberations toward a guilty verdict. First, "eliciting 'yes' or 'no' answers to questions concerning the elements of an offense may propel a jury toward a logical conclusion of guilt, whereas a more generalized assessment might have yielded an acquittal." *United States v. Ruggiero*, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part). Second, "fragmenting

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unfairness that would be caused if this Court accepted the Seventh Circuit's rule.

18. *See, e.g., United States v. Edelkind*, 467 F.3d 791, 794 (1st Cir. 2006) ("[S]pecial interrogatories in criminal cases ... pose special dangers."); *United States v. Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987) ("[J]ury interrogatories in criminal cases are generally disfavored."); *United States v. Riccobene*, 709 F.2d 214, 228 n.19 (3d Cir. 1983); *United States v. Udeozor*, 515 F.3d 260, 271 (4th Cir. 2008); *United States v. Bosch*, 505 F.2d 78, 82 (5th Cir. 1974); *United States v. Wilson*, 629 F.2d 439, 444 (6th Cir. 1980); *United States v. Pierce*, 479 F.3d 546, 551 (8th Cir. 2007); *United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008).

a single count into the various ways an offense may be committed affords a divided jury an opportunity to resolve its differences to the defendant's disadvantage by saying 'yes' to some means and 'no' to others, although unified consideration of the count might have produced an acquittal or at least a hung jury." *Id.*

Special interrogatories also threaten to confuse the jury, *e.g.*, *Wilson*, 629 F.2d at 444, and to infringe on the jury's authority to apply law to facts and render a verdict without having to articulate reasons, *e.g.*, *United States v. McCracken*, 488 F.2d 406, 418–19 (5th Cir. 1974). Such questions threaten to "restrict [the jury's] historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case." *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir. 1976) (quoting *United States v. Ogull*, 149 F. Supp. 272, 276 (S.D.N.Y. 1957)). Because special interrogatories risk prejudice to the defendant and interfere with the jury's historic authority to render a general verdict, they have long been disfavored.

This is not to say that special interrogatories are never beneficial or may never be used. Courts have approved their use in complex cases involving alleged racketeering or continuing criminal enterprises.[19] In such settings, interrogatories can "decrease the likelihood of juror confusion and ... aid the

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19. *See, e.g.*, *United States v. Cianci*, 378 F.3d 71, 90–91 (1st Cir. 2004) (endorsing use of special verdict forms in racketeering cases to "allow[] juries to specifically identify the predicates for the general verdict"); *United States v. Ogando*, 968 F.2d 146, 148–49 (2d Cir. 1992) (stating "preference for special interrogatories in particularly complex criminal cases").

jury in concentrating on each specific defendant, and the charges against him, rather than incriminating one potentially innocent defendant solely on the basis of his association with the others." *United States v. Palmeri*, 630 F.2d 192, 202 (3d Cir. 1980). "[N]otwithstanding the law's traditional distaste for special interrogatories," they "allow an assessment of whether the jury's determination of guilt rested on permissible bases" where the charged offense requires proof of specific predicate facts. *Ogando*, 968 F.2d at 148–49 (internal quotation marks omitted). Similarly, after a guilty verdict, courts employ interrogatories to enable the jury to determine facts that bear on a defendant's maximum sentence to vindicate a defendant's Sixth Amendment right to a jury trial. *See, e.g., United States v. Arnold*, 416 F.3d 349, 356 (5th Cir. 2005) (drugs); *United States v. Hedgepeth*, 434 F.3d 609, 613–14 (3d Cir. 2006) (firearms).

Given these competing considerations, whether to propose or consent to special interrogatories can be a difficult decision, requiring defense counsel to weigh numerous factors. The risks of jury confusion inherent in using special verdicts, their coercive nature, the precise wording of the questions, or the timing or manner of their presentation to the jury may prove decisive. On timing, for example, courts have recognized that the "better practice [is] to submit the general verdict and special verdict forms separately"—as Petitioners proposed in the trial court, *see* J.A. 432a–435a—so that the interrogatories pose no risk of influencing the jury's deliberations on the charged offenses. *Udeozor*, 515 F.3d at 271. *See also Riccobene*, 709 F.2d at 228 n.19 (noting that "the dangers usually involved in the use of jury interrogatories in a

criminal case were not present" because the government's questions would have been submitted after the jury returned a verdict). As the Third Circuit has recognized, the "theoretical advantage to a defendant" of a special interrogatory versus a general verdict "must be evaluated by the trial lawyer who is on the scene and can weigh the intangibles of the trial atmosphere far better than [an appellate court can]." *United States v. Desmond*, 670 F.2d 414, 419 (3d Cir. 1982).

B. The Seventh Circuit's unprecedented rule would unfairly compel defendants to choose between two sources of prejudice.

The Seventh Circuit held that Petitioners had "forfeited their objection" to the disputed jury instruction on honest-services fraud by refusing to accept the government's proposed special verdict form. *See* Pet. App. at 9a–12a (discussing *Yates v. United States*, 354 U.S. 298 (1957)). By imposing this forfeiture rule, the Seventh Circuit places defendants in the untenable position of having either to accept prejudicial interrogatories or to forfeit objection to prejudicial instructional error.

This harsh result is without precedent. No other court has imposed the penalty of forfeiture on a criminal defendant simply for declining a special verdict form or interrogatory that defense counsel believes to be prejudicial.

Indeed, the Third Circuit has expressly refused to compel such a choice. In *Riccobene*, the court repudiated the government's argument that the defendants "had waived their right" to appeal an issue by objecting to special interrogatories proposed by the gov-

ernment. 709 F.2d at 227–28. Like the Seventh Circuit, which accused Petitioners of objecting to interrogatories simply "to reserve the right to make" an argument on appeal, Pet. App. 11a, the government argued that the defendants in *Riccobene* had "invited error" because if they "had allowed the special interrogatories, then there would have been no" problem to challenge on appeal, *Riccobene*, 709 F.2d at 228. Given that "[i]t is within the discretion of the district court to permit special interrogatories," the Third Circuit refused to "impose upon the defendants the harsh penalty of waiver merely for requesting that the district court exercise its discretion in a manner contrary to the government's preferences." *Id.*[20]

Other federal courts of appeals have articulated similar views. In *Spock*, the First Circuit confronted a situation where, as here, it was unclear on which legal theory the jury had relied in reaching a guilty verdict. *See* 416 F.2d at 180–83. The First Circuit explained that the legitimacy of a district court's aim in seeking to avoid a *Yates* problem does not offset or overcome the prejudice caused by special interrogatories:

> If the [special interrogatory] procedure was, as we hold, prejudicial to the rights of the defendants, it is not saved by the propriety of the court's motive, doubtless a strong one in this particular case

20. The Seventh Circuit contended that the Third Circuit later "made clear that it is better to give the jurors the interrogatories on the same form as the verdict." Pet. App. 11a. The Third Circuit, however, made clear only that a trial court, using proper instructions, *may* include interrogatories on the same form, not that doing so is *better* than submitting questions separately. *Hedgepeth*, 434 F.3d at 613–14.

> where difficult legal issues were involved, *cf. Yates v. United States,* supra, of avoiding an appellate court's dilemma due to ignorance of what theory the jury based its verdict upon.

Id. at 183 n.42.

The Second Circuit rejected the government's similar argument in *United States v. Adcock* that the defendant's failure to request a special verdict should suffice to defeat a *Yates* claim. *Adcock*, 447 F.2d 1337, 1338 (2d Cir. 1971).[21] In contrast to *Adcock*, Petitioners *did* request a post-verdict interrogatory that would have identified the legal theory or theories relied upon by the jury in reaching a guilty verdict on mail fraud. J.A. 432a–435a. If forfeiture is inappropriate where, as in *Adcock*, a defendant fails to request an interrogatory, then it must be inappropriate where, as here, Petitioners proposed a post-verdict interrogatory that the district court declined to submit.

C. None of the policy justifications for forfeiture rules applies here.

"In general, the law ministers to the vigilant" by requiring litigants to make contemporaneous objections to perceived errors by a trial court. *United States v. Taylor*, 54 F.3d 967, 972 (1st Cir. 1995). Forfeiture and waiver rules accordingly give trial

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21. The Second Circuit's decision in *United States v. Wilkinson* is not to the contrary because the court, in finding that the defendant had forfeited a sufficiency of the evidence claim, rested primarily on the fact that "[n]o proposed jury instruction on the subject was requested nor was an objection made to [the district court's] instruction." 754 F.2d 1427, 1432 (2d. Cir. 1985).

courts "an opportunity to correct the problem before irreparable harm occurs." *Id.* They also prevent parties from "sandbagging" by "making a tactical decision to refrain from objecting, and subsequently ... assigning error (or, even worse, planting an error and nurturing the seed as insurance against an infelicitous result)." *Id.* Because those policy concerns have no application in this case, the Seventh Circuit's novel forfeiture rule is especially unjustified.

The district court had ample notice of Petitioners' objection to the mail fraud instruction. From the bench, the judge ruled that Petitioners' proposed instruction, which would have required proof that "the scheme, if successful, must wrong the alleged victim's property rights in some way," was "not the law in this circuit." Pet. App. 220a. The Seventh Circuit described that jury instruction as "the focus of the appeals," never suggesting that Petitioners had failed to raise the issue before the district court. *Id.* at 4a.

As for sandbagging, Petitioners placed the district court on notice more than once—initially by unsuccessfully proposing an instruction that would have required a finding of economic harm to the victim, and then, after the jury was charged, by renewing their objection. *Id.* at 197a; 248a. A defendant's legitimate refusal to accept a prejudicial special verdict form cannot fairly be impugned as a tactical attempt to plant an error; rather, that decision helps safeguard a defendant's right to a fair trial. In any event, Petitioners themselves proposed a post-verdict interrogatory that would have directed the jury, in the event of a guilty verdict on mail or wire fraud, to identify whether they had engaged in property fraud, or honest services fraud, or both. J.A. 432a–435a.

Recognizing that "the jury's specification of the mail/wire fraud theory might be helpful to appellate review in the event of a guilty verdict," Petitioners offered this counter-proposal to the government's special verdict form "as an accommodation to the competing interests." *Id.* at 432a.

Under these circumstances, there is no plausible rationale for imposing the severe penalty of forfeiture.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

AUGUST 2009

JONATHAN L. MARCUS
Counsel of Record
ROGER A. FORD
JAMES MCCALL SMITH
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000
Counsel for Amici Curiae

BARBARA E. BERGMAN
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1117 Stanford Drive, N.E.
Albuquerque, N.M. 87131
(505) 277-3304
Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

BARRY A. BOHRER
ALEXANDRA A.E. SHAPIRO
NEW YORK COUNCIL OF
DEFENSE LAWYERS
565 Fifth Ave., 10th Floor
New York, NY 10017-2413
(212) 479-6724
Counsel for Amicus Curiae
New York Council of Defense
Lawyers

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 6 - 2009
OFFICE OF THE CLERK

(5)

No. 08-876

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF JEFFREY K. SKILLING AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

DANIEL M. PETROCELLI
(*Counsel of Record*)
M. RANDALL OPPENHEIMER
MATTHEW T. KLINE
DAVID J. MARROSO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
7th Floor
Los Angeles, California 90067
(310) 553-6800

WALTER DELLINGER
JONATHAN D. HACKER
IRVING L. GORNSTEIN
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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QUESTION PRESENTED

This brief addresses the following question encompassed by the petition for a writ of certiorari:

Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, as the Seventh Circuit held below.

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BRIEF OF JEFFREY K. SKILLING AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Jeffrey K. Skilling respectfully submits this brief as *amicus curiae* in support of neither party, with the written consent of the parties.[1]

INTEREST OF *AMICUS CURIAE*

Jeffrey K. Skilling is a former executive for Enron Corporation. Once America's seventh-largest company, Enron went bankrupt in a matter of weeks in 2001. In May 2006, a jury convicted Skilling on 19 criminal counts, each predicated on an alleged conspiracy to commit securities or wire fraud in connection with Enron's collapse. He has been incarcerated since December 2006.

A centerpiece of the government's case was "honest services" wire fraud under 18 U.S.C. § 1346. Skilling was convicted under the statute even though, by everyone's admission, he sought only to advance Enron's interests, did not act out of greed, and did not seek or receive *any* private gain from his acts. The Fifth Circuit agreed that Skilling was seeking only to pursue Enron's interests and not his own private gain, but it held that proof of private gain is not necessary for a conviction under § 1346. The sole question, the court held, is whether the defendant breached a state-law fiduciary duty and thereby caused harm to the employer.

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[1] Letters of consent have been filed with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or his counsel has made a monetary contribution to the preparation or submission of this brief.

Because the Fifth Circuit's holding conflicts directly with the decisions of other federal circuits, which have held that a § 1346 conviction requires proof that the defendant sought to pursue his own private interest rather than his employer's, Skilling filed a petition for a writ of certiorari (No. 08-1394) ("*Skilling* Pet."). That petition is currently pending before this Court.

Skilling has a strong interest in this case because it presents a distinct but related question concerning the scope of honest-services fraud under § 1346. The result and reasoning of the Court's decision in this case could directly affect his chances of obtaining the reversal of his conviction and release from prison.

INTRODUCTION AND SUMMARY

The substantive question presented by petitioners is whether a private-sector employee who violates a fiduciary duty to his employer may be convicted of "honest services" fraud under 18 U.S.C. § 1346, even if he does not contemplate that his actions will cause economic harm to the employer.

No matter how the Court answers that question, it should not lose sight of an important point of agreement between petitioners, the Government, and the court of appeals in this case. Each recognized in the proceedings below that § 1346 requires proof that the defendant acted for "private gain," rather than to advance the employer's interests. The court of appeals correctly applied that requirement, finding it satisfied in this case because petitioners' acts were self-avowedly designed to achieve a significant tax benefit under Canadian law. *U.S. v. Black*, 530 F.3d 596, 600 (7th Cir. 2008). Neither the Government nor petitioners have challenged that re-

quirement here.

Petitioners instead argue that the decision below is wrong because they did not intend for their private gain to come *at the expense of their employer*. That is, petitioners concede "that they sought a private gain," but they contend that they did not violate § 1346 because that private gain "was intended to be a gain purely at the expense of the Canadian government," not the employer to whom they owed a duty of honest services. *Black*, 530 F.3d at 600.

Whatever may be the merits of that argument, the threshold premise of the decision below is crucial and must be reaffirmed: to establish a violation of § 1346, the Government must show *at least* that the defendant-employee sought to pursue private gain from *some source*. Although the Government has not challenged that requirement here, in numerous other prosecutions and appeals, the Government has advanced the much broader position that a defendant can be convicted under § 1346 for *any* material breach of a legal or ethical duty, even if the defendant did not seek private gain from the breach. That position has been adopted by several circuit courts, *see Skilling* Pet. 19-20, including the Fifth Circuit in Skilling's case, *see U.S. v. Skilling*, 554 F.3d 529, 544 (5th Cir. 2009) (rejecting requirement that defendant had "intent ... to obtain personal benefit" (quoting *U.S. v. Gray*, 96 F.3d 769, 774 (5th Cir. 1996)); *id.* at 547 (to establish violation of § 1346, government need prove only "(1) a material breach of a fiduciary duty imposed under state law ... (2) that results in a detriment to the employer"). Other circuits—including the Second Circuit en banc in a leading opinion joined by Judge Sotomayor—have rejected

that position, holding instead that a § 1346 conviction will lie only where the employee pursued his own private interests rather than his employer's. *Skilling* Pet. 18-19.

This brief primarily addresses that threshold issue. In analyzing petitioners' argument that the employee's pursuit of private gain must be accompanied by a foreseeable risk of economic harm to the employer, the Court should reject any suggestion by the Government that § 1346 does not require the prosecution even to prove that the employee sought private gain in the first place. As shown below, private gain is a required element in all § 1346 cases.

I.A. Congress enacted § 1346 to reverse the result of *McNally v. United States*, 483 U.S. 350 (1987), and to reinstate pre-*McNally* "honest services" caselaw. In the context of private-sector employers, honest-services cases before *McNally* uniformly involved defendants who acted for private gain, usually by accepting bribes or kickbacks from third parties, or by engaging in secret self-dealing. When a defendant did not act for private gain, courts before *McNally* did not hesitate to reverse convictions for honest-services fraud.

B. Absent a private-gain requirement, the statute would broadly criminalize all acts of poor judgment in the conduct of corporate affairs, even where the employee intended the act to advance the employer's interests rather than his own. There is no evidence that Congress intended to enact an unwritten private corporate code of fair, wise, and ethical conduct, enforceable by threat of federal imprisonment.

C. Absent a requirement of private gain, § 1346 is an unconstitutionally vague and unenforceable statute. If § 1346 permits conviction merely for any harmful material breach of a fiduciary duty, as the Government has argued in Skilling's case and others, then the statute is explicitly a common-law criminal statute, with its scope "found" or "developed" entirely by common-law reasoning of courts applying unwritten fiduciary standards. As such, it provides no forewarning to corporate employees as to which acts taken in service of the employer's interests will land them in federal prison, and it gives virtually unfettered discretion to prosecutors to charge crimes for acts that appear unwise in hindsight.

II. In the years since Congress amended the wire and mail fraud statutes to prohibit honest services fraud, three important conflicts in the circuits have emerged. The Court has already granted two cases for this Term addressing two of the conflicts—the instant case, and *Weyhrauch v. U.S.*, No. 08-1196. It should grant Skilling's petition, which presents the third conflict, as well. The lower courts, corporate employees, and prosecutors would all be best served if the Court addressed the issues raised by these three conflicts comprehensively. Addressing the three cases together would permit the Court to consider the interplay of these related issues, and would provide more complete guidance concerning the scope of the statute.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THE PRE-*McNALLY* REQUIREMENT THAT A DEFENDANT WHO DOES NOT ACT FOR "PRIVATE GAIN" HAS NOT COMMITTED HONEST-SERVICES FRAUD

A. Cases Prior To *McNally* Uniformly Required Proof That The Defendant Misused His Office For "Private Gain"

1. The general mail fraud statute prohibits "any scheme or artifice to defraud" using the mails. 18 U.S.C. § 1341. In *McNally*, this Court considered "a line of decisions from the Courts of Appeals" interpreting that statute to prohibit "schemes to defraud citizens of their intangible rights to honest and impartial government." 483 U.S. at 355. "Under these cases," the Court explained, "a public official owes a fiduciary duty to the public, and misuse of his office *for private gain* is a fraud." *Id.* (emphasis added).

The Court in *McNally* declined to read that judge-made theory into the general mail and wire fraud statutes, emphasizing that "when there are two rational readings of a criminal statute, one harsher than the other," courts should "choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359-60. "There are no constructive offenses," the Court explained, "and before one can be punished, it must be shown that his case is plainly within the statute." *Id.* at 360 (quoting *Fasulo v. U.S.*, 272 U.S. 620, 629 (1926)). Declining to construe the statute "in a manner that leaves its outer boundaries ambiguous," the Court held that Congress "must speak more clearly than it has" if it

wished to criminalize the kind of "honest services" fraud identified in prior caselaw. *Id.*

Congress responded to that invitation by enacting 18 U.S.C. § 1346, which extended the definition of a scheme or artifice to defraud to include "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (1988). Though the operative phrase "intangible right of honest services" has no cognizable meaning on its face, *see infra* at 15-17, its general objective was to capture "the pre-*McNally* understanding of the scope of the mail fraud statute." Gov't Br. in Opp. 12; *see Cleveland v. U.S.*, 531 U.S. 12, 19-20 (2000) (amended statute covers "one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*"); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 114-15 (1991) (Stevens, J., dissenting) (§ 1346 restores "the widely held view of lower courts [pre-*McNally*] about the scope of fraud"). The statute refers to "*the* intangible right of honest services," 18 U.S.C. § 1346 (emphasis added), suggesting that Congress meant to codify a preexisting "'intangible right of honest services[]' which had been protected before *McNally*," rather than "all intangible rights of honest services whatever they might be thought to be." *U.S. v. Rybicki*, 354 F.3d 124, 138 (2d Cir. 2003) (en banc).

2. As *McNally* itself makes clear, "private gain" was a critical component of honest-services fraud at the time of the decision. The scheme in *McNally* itself involved "monetary kickbacks" for the private benefit of the defendants. 483 U.S. at 356 (internal quotation omitted); *see id.* at 375 (Stevens, J., dis-

senting) (scheme was designed to "secretly make hundreds of thousands of dollars available for the private use of petitioners, their relatives, and their paramours"). And in describing the line of lower-court decisions under review, the Court expressly characterized those cases as involving the "misuse of [one's] office *for private gain*." 483 U.S. at 355 (emphasis added); *id.* at 362-63 (Stevens, J., dissenting).

The "private sector" cases discussed in the *McNally* dissent demonstrate the application of the private-gain requirement in that context. Summarizing the existing caselaw, the dissent explained that "[i]n the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions *by accepting kickbacks or selling confidential information*." *Id.* at 363 (emphasis added). Every one of the cited private-sector cases unmistakably involved actions designed to obtain private gain, rather than to advance the employer's interest.[2] Because Congress

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[2] *See U.S. v. Price*, 788 F.2d 234, 235-36 (4th Cir. 1986) (union officials overcharged new applicants for membership, and kept extra money for officials' "own benefit"); *U.S.v. Boffa*, 688 F.2d 919, 923-24 (3d Cir. 1982) (corporate officers bribed a union official with a 1975 Lincoln Continental); *U.S. v. Curry*, 681 F.2d 406, 409 (5th Cir. 1982) (chairman of PAC "converted" $15,000 in campaign funds "to his own personal use"); *U.S. v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) (law partner received $12,500 for secretly representing client with interests adverse to another client, over his firm's explicit prohibition); *U.S. v. Von Barta*, 635 F.2d 999, 1003, 1007 (2d Cir. 1980) (self-dealing by bond trader who secretly "pocketed nearly $100,000" while shifting risk to his employer); *U.S. v. Bohonus*, 628 F.2d 1167, 1169 (9th Cir. 1980) (corporate agent personally received kickback payments from supplier); *U.S. v. Bryza*, 522 F.2d 414,

enacted § 1346 to reinstate the honest services fraud doctrine as it existed prior to *McNally*, the decisions cited by the dissent as "thoughtfully considered and correct[]," *id.* at 376, well reflect Congress's understanding of the statute's meaning. *See Rybicki*, 354 F.3d at 138 n.13.

3. Other pre-*McNally* cases from the private sector confirm that private gain was central to the concept of "honest services" fraud. In its leading *Rybicki* opinion, the en banc Second Circuit "reviewed the principal pre-*McNally* decisions involving or purportedly involving 'honest services' fraud in the private sector," beginning with the cases "catalogued by Justice Stevens in his dissent in *McNally*" and "augment[ing]" the list with its own research. *Id.* at 138-39 & n.13. The court concluded that the cases "fall into two general groups." *Id.* at 139. One involves "bribes or kickbacks"; the other involves "self-dealing." *Id.*

In the bribery and kickback cases, a third party seeking to do business with the employer "secretly pays the [employer's] employee (or causes such a payment to be made) in exchange for favored treatment." *Id.* (discussing eight examples). In the "self-dealing" cases, the defendant "typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer." *Id.* at 140 (discussing six examples). The self-dealing cases were "thus of the same general import as the bribery

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415-16 (7th Cir. 1975) (same); *U.S. v. George*, 477 F.2d 508, 510 (7th Cir. 1973) (same); *U.S. v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) (corporate agents bribed competitor's employees).

cases," in that both involved undisclosed, improper payments or benefits to employees. *Id.* at 141.

In other words, what is common to *all* pre-*McNally* honest-services fraud cases, *Rybicki* makes clear, is an employee who was pursuing some form of private gain distinct from the normal incentives offered by the employer to promote employee performance. The basic rule drawn from the pre-*McNally* caselaw, and hence enacted in § 1346, is that honest-services fraud constitutes a scheme "to enable an officer or employee of a private entity ... purporting to act for and in the interests of his or her employer ... secretly to act in his or her ... own interests instead." *Id.* at 141-42. Accordingly, where the employee is *not* acting to pursue his own interests instead of his employer's, § 1346 is categorically inapplicable.

Notably, when private-sector employees did *not* act for their own private gain, courts before *McNally* reversed convictions for honest-services fraud. In *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), Judge Friendly's opinion for the Second Circuit cited "abundant authority" from federal courts of appeals holding that "a scheme to use a private fiduciary position *to obtain direct pecuniary gain* is within the mail fraud statute." *Id.* at 1399 (emphasis added). But it reversed the conviction of a corporate officer who failed to make required disclosures to stockholders, on the ground that the officer himself "received no money or property by virtue of the omission" and the undisclosed information was not material. *Id.* at 1400. Distinguishing cases in which the defendant acted "to enhance his private advantage"—"by taking bribes," for example—Judge Friendly concluded that mail fraud requires an

"element of corruption" that was "not present" under the circumstances, where the defendant did not act for private gain. *Id.* at 1400-01.[3]

Even outside the fraud context, courts recognized that the duty of "honest services" is centrally about avoiding the pursuit of private gain. In one of the earliest reported cases to employ the phrase "honest services" to describe any corporate employee duty, the Michigan Supreme Court expressly distinguished the duty from the duty of good faith in the conduct of corporate affairs: "Good faith," the court explained, "includes not only personal upright mental attitude and clear conscience, but also intention to observe legal duties." *Bliss Petroleum Co. v. McNally*, 254 Mich. 569, 573 (1931). "Honest service," by contrast, "includes *elimination of private gain in corporate transactions* conducted by directors and not approved by other authorized disinterested officers, with full knowledge of the facts." *Id.* (emphasis added).

In short, caselaw prior to *McNally* long and consistently recognized that acts taken for private gain are the sine qua non of a breach of the duty of honest services. We have found no pre-*McNally* case from any jurisdiction finding a breach of the duty where

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[3] One court of appeals has stated that pre-*McNally* honest-services cases "do exist" in which the defendant did not act for private gain. *U.S. v. Panarella*, 277 F.3d 678, 692 (3d Cir. 2002). But the only appellate case cited for that proposition is *U.S. v. Bush*, 522 F.2d 641, 643 (7th Cir. 1975), a public-sector case involving a government official. And the Seventh Circuit, construing its own precedent, has stressed that the scheme in *Bush* was in fact undertaken for private gain. *U.S. v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998).

the defendant did not seek to obtain private gain. The Court therefore should reject any suggestion the Government might make in this case that a detrimental breach of fiduciary duty alone—without any accompanying intent to obtain a private benefit from the act—is enough to establish a § 1346 violation.

B. Requiring Private Gain Sensibly Differentiates Between Unwise Or Unethical Acts And Criminal Conduct

Recognizing the central role of private gain in pre-*McNally* caselaw, the court of appeals that issued the decision below has previously held that an "employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain." *U.S. v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998); *see id.* at 655 ("misuse of position[] for private gain is the line that separates run of the mill violations of state-law fiduciary duty ... from federal crime").

Applying that principle in *U.S. v. Thompson*, 484 F.3d 877 (7th Cir. 2007), the court reversed a § 1346 conviction based on a violation of state procurement rules in awarding a travel contract. Even though the employee's conduct was nominally improper, the court reasoned, she "did not bilk the state out of any money or pocket any of the funds that were supposed to be used to buy travel," but instead sought "to pursue the public interest as [she] understood it." *Id.* at 882, 884. And while she also anticipated pleasing her employer and obtaining a salary bonus as a result, the court held that "neither an increase in salary for what one's superiors deem a good job, nor an addition to one's peace of mind, is a 'private benefit' for the purpose of § 1346." *Id.* at 884. Although the

pursuit of "private gain" might "linguistically" encompass the pursuit of standard salary benefits, the *Thompson* court emphasized that no honest-services fraud appellate decision had ever applied the "private gain" requirement that way. *Id.* Rather, the "history of honest-services prosecutions is one in which the 'private gain' comes from third parties who suborn the employee with side payments, often derived via kickbacks." *Id.*

As already shown, there is no basis in the pre-*McNally* caselaw for expanding honest-services fraud to acts taken for reasons other than private gain. Nor is there any basis in policy. To the contrary, eliminating the private gain requirement would sweep in a "staggeringly broad swath of behavior." *Sorich v. U.S.*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). In the absence of a requirement of private gain, any material act of bad judgment by an employee could become federal criminal conduct, as exemplified by the parade of horribles listed by Judge Easterbrook in *Thompson*, 484 F.3d at 882-83.

But the problem is not merely hypothetical. Jeff Skilling—contrary to media-fueled public perceptions about his case—is a living example. The Government openly conceded at trial that Skilling stole no money from Enron, that the case against Skilling was not about "greed," that Skilling always sought to pursue Enron's "best interests," and that every act for which he was prosecuted was undertaken for the purpose of protecting Enron and promoting its share value. *Skilling* Pet. 3-4. Indeed, when arguing about the appropriate jury charge in his case, the Government conceded that "the indictment does not

allege, and the government's evidence did not show, that defendants engaged in bribery." *Skilling* R:41327-28. And it successfully objected to Skilling's requested instruction that the prosecution must show "something close to bribery," arguing that the instruction was "setting the bar a little bit high for honest services violations." *Skilling* R:36022.

The Government instead was allowed to proceed under its much broader honest services theory, which was that Skilling simply took on too much leverage and too much risk for the long-term good of Enron, and improperly touted the company. *Skilling* Pet. 3-5. But all corporate officers necessarily take business risks and cheerlead, and a rule that criminalizes every business decision that seems imprudent to prosecutors or lay jurors in hindsight—even if the officer genuinely sought to pursue the interest of his employer—would force officers to proceed at their peril in making everyday business judgments, as happened in Skilling's case. *See U.S. v. Turner*, 551 F.3d 657, 667-68 (7th Cir. 2008). Indeed, in most civil cases a corporate officer would be afforded the benefit of the "business judgment rule," but the Government's theory of honest services in Skilling's case included no such defense. Instead the Government urged the jury to send Skilling to prison simply because he breached his "duty to do [his] job and do it appropriately," *Skilling* Pet. 4—exactly the approach rejected by Judge Friendly in *Dixon*. *See* 536 F.2d at 1400-01.

An employee who commits some wrongful, unethical, or unwise act while faithfully pursuing what he understands to be the employer's objectives may violate some other legal duty—perhaps even a duty

enforced by a different criminal sanction—but he has not committed the federal crime of denying the employer his honest services. *See U.S. v. Brown*, 459 F.3d 509, 522 & n.13 (5th Cir. 2006). Scores of other legal rules and extra-legal norms exist to regulate the conduct of corporate employees and officers. These rules include state tort laws and fiduciary standards, criminal laws prohibiting theft, embezzlement, and money and property fraud, securities laws (both civil and criminal), administrative rules, professional standards, and ethical codes. The *independent* function of the honest-services fraud law is to prohibit employees from using their positions to pursue their own private interests rather than the interests of their employers. Bribes, kickbacks, and self-dealing qualified as honest-services violations in the pre-*McNally* jurisprudence, while other misconduct and lapses in judgment did not, because the former acts clearly demonstrated that the employee was pursuing his own interests, not his employer's. *Bloom*, 149 F.3d at 656-57. Where an employee has not sought such private gain, his conduct, no matter how questionable, unwise, or wrongful, should not be subject to prosecution under § 1346, but should be left to prohibition and punishment under other laws, rules, and norms.

C. Absent A Limitation Tying § 1346 Directly To The Pursuit Of Private Gain By The Employee, § 1346 Is Unconstitutionally Vague

As a host of courts have recognized, the phrase "the intangible right of honest services," standing alone, "is vague and undefined." *U.S. v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008); *see Brown*, 459

F.3d at 520 (§ 1346 is a "facially vague criminal statute"); *U.S. v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (§ 1346 is "amorphous and open-ended"); *U.S. v. Brumley*, 116 F.3d 728, 736 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting) (§ 1346 is "general, undefined, vague, and ambiguous").

A statute violates due process, of course, when it is so vague that it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). Section 1346, on its face, is just such a statute. "[T]he text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute." *U.S. v. Handakas*, 286 F.3d 92, 105 (2d Cir. 2002), *overruled in part by Rybicki*, 354 F.3d at 144; *see U.S. v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2002) ("the plain language of § 1346 provides little guidance as to the conduct it prohibits"); *Bloom*, 149 F.3d at 656 (§ 1346 provides little guidance as to "how far the intangible rights theory of criminal responsibility really extends").

If the statute is construed, consistent with its history, as criminalizing only bribes, kickbacks, and self-dealing, that construction would go a long way toward providing corporate employees with the notice they need to understand what conduct is subject to criminal sanction, as the en banc Second Circuit's *Rybicki* decision suggests. Indeed, it was *only* by construing the statute that way that the *Rybicki* court was able to uphold the statute against constitutional vagueness challenges. *See* 354 F.3d at 142-43 (as applied), 144 (facial). Absent that limiting

construction, the facially meaningless words of § 1346 remain just that—facially meaningless words.

While petitioners in this case contend that a requirement of reasonably foreseeable economic harm is necessary to cure the constitutional problems in § 1346, that requirement is subject to hindsight bias and juror confusion, and thus would not suffice to provide corporate employees with adequate notice as to which risky business judgments could wind up subjecting them to criminal sanction years later. By contrast, the private-gain requirement recognized in pre-*McNally* caselaw provides employees with at least the clear understanding that if they make business decisions (risky or otherwise) not to advance their understanding of the corporation's goals, but to line their own pockets, they could face criminal prosecution for those decisions.

The private-gain requirement also helps mitigate the other constitutional objections noted by petitioners:

• Requiring private gain significantly limits the risk of "arbitrary and discriminatory enforcement" under the statute. *Morales*, 527 U.S. at 56. Federal prosecutors now wield § 1346 in broad circumstances—particularly when they believe their cases of genuine corporate crime are weak—to obtain convictions simply by creating an air of apparently questionable or unseemly conduct in the case, as prosecutors did in *Thompson* and in Skilling's case. But the office of § 1346 is not to punish general employee misconduct—specific statutes and rules exist to serve that function, as just discussed. Section 1346 instead exists to punish *one particular type of misconduct*: the misuse of authority to pursue pri-

vate gain rather than the employer's interests. Tethering the statute to cases involving private gain precludes overbroad use of the statute to backstop weak prosecutions for conduct more properly governed by other statutes.

• The private-gain requirement also ensures that § 1346 does not merely criminalize unspecified breaches of fiduciary duties—duties not written into the statute, but defined only by judicial decisions over time, in the manner of an impermissible common-law criminal prohibition. *See Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari) (noting "serious argument" that "a freestanding, open-ended duty to provide 'honest services'—with the details to be worked out case-by-case"—amounts to "nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct"); *see also Brown*, 459 F.3d at 521-22; *Bloom*, 149 F.3d at 654; *Skilling* Pet. 25. Requiring private gain limits the statute to a particular, well-recognized, concrete class of fiduciary breach cases, i.e., cases where the employee used his position to pursue his own interests instead of his employer's. On that reading of the statute, courts need not "find" or "develop" over time the basic standards defining criminal employee conduct.

• Finally, the private-gain requirement minimizes the intrusion on the states' traditional authority to regulate corporate employee and officer conduct. Common-law fiduciary duties emerged in state courts as a basis for civil liability, and state courts remain primarily responsible for their enforcement. Construing § 1346 as adding severe federal penalties for ordinary violations of state-law civil duties and

employment obligations—absent proof that the employee sought to use federal mails and wires to achieve his own private gain—would disrupt that scheme. *See Jones v. U.S.*, 529 U.S. 848, 858 (2000); *U.S. v. Sorich*, 531 F.3d 501, 503 (7th Cir. 2008) (Kanne, J., dissenting from denial of rehearing en banc).

II. THE COURT SHOULD ADDRESS RELATED § 1346 ISSUES TOGETHER IN A TRILOGY OF CASES: *BLACK*, *WEYHRAUCH*, AND *SKILLING*

Since Congress enacted § 1346 in 1988, three important conflicts in the courts have arisen over its meaning in application. This Court will address two of those conflicts in cases already granted for the October 2009 Term. In this case, of course, it will consider the question whether an employee's private gain must come at the expense of his employer. In *Weyhrauch v. U.S.*, No. 08-1196, the Court will consider the question whether § 1346 requires proof that the employee violated a disclosure duty established by state law.

Neither case squarely presents one of "the principal devices the Courts of Appeals have used in an effort to limit § 1346": whether a conviction requires proof that the employee's conduct was intended to obtain "private gain." *Sorich*, 129 S.Ct. at 1310-11 (Scalia, J., dissenting from denial of certiorari). Skilling's petition presents exactly that interpretive question. *Skilling* Pet. i. Skilling's petition also raises the question whether § 1346 is unconstitutionally vague, *id.*—a question neither *Black* nor *Weyhrauch* raises explicitly.

This Court has in the past granted review of multiple cases during a single Term to address related issues under a single statute or rule.[4] It should do so here. As already noted, the Government might raise directly in this case the question whether § 1346 always requires proof that the employee sought private gain. But whether the Government expressly raises that issue or not, analysis of the question whether (and when) private gain must come at the employer's expense surely would benefit from a thorough analysis of the threshold private gain requirement itself. And while petitioners here elaborate at length the constitutional doubts arising from the vagueness of § 1346, they did not expressly raise a constitutional challenge in their petition. The Court might deem that challenge fairly encompassed by the petition, but if not, then Skilling's petition would be an ideal vehicle for addressing it.

The *Weyhrauch* petition, too, raises only one of the issues that has divided the courts and confused corporate employees concerning the meaning and application of § 1346. And its resolution, while important, still will solve only part of the problem created by the statute. Weyhrauch argues that the Government must prove the violation of a state-law disclosure duty as a predicate for a § 1346 violation.

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[4] *See, e.g., Brewer v. Quarterman*, 550 U.S. 286 (2007), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (both addressing Texas capital sentencing statute); *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (both construing IIRIRA's jurisdiction-stripping provision); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967), and *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967) (all addressing ripeness in review of agency decisions).

The Government responds that the relevant disclosure duty arises directly from the statute—or, more accurately, must be read into the statute—as a matter of federal statutory construction. Neither answer to that question will be entirely satisfying, however, because either way the duties enforced by the criminal statute will still be a matter for courts to determine through common-law-style reasoning and case-law accretion. The statute thus would still fail to give clear warning to those subject to its sanction, and would still confer overbroad authority on courts (and prosecutors) to determine the substance and reach of federal criminal law. And neither approach would require courts to enforce in all cases the one requirement consistently applied by pre-*McNally* courts, and recognized by all Justices in *McNally* itself: the requirement of private gain.

Accordingly, while resolution of the questions presented in *Black* and *Weyhrauch* is necessary and important, so too is resolution of the questions presented in *Skilling*. Lower courts, prosecutors, and corporate employees have endured far too long with weak and inconsistent guidance as to the meaning of § 1346. Granting all three cases will facilitate this Court's analysis of the interrelated issues presented in the cases, and it will ensure that those who must implement the statute, and those who face the threat of its sanction, finally receive the comprehensive guidance as to its meaning and operation to which they are entitled.

CONCLUSION

The Seventh Circuit's holding that proof of private gain is required in all cases under § 1346 should be affirmed.

Respectfully submitted,

DANIEL M. PETROCELLI
(*Counsel of Record*)
M. RANDALL OPPENHEIMER
MATTHEW T. KLINE
DAVID J. MARROSO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
7th Floor
Los Angeles, California 90067
(310) 553-6800

WALTER DELLINGER
JONATHAN D. HACKER
IRVING L. GORNSTEIN
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

August 6, 2009